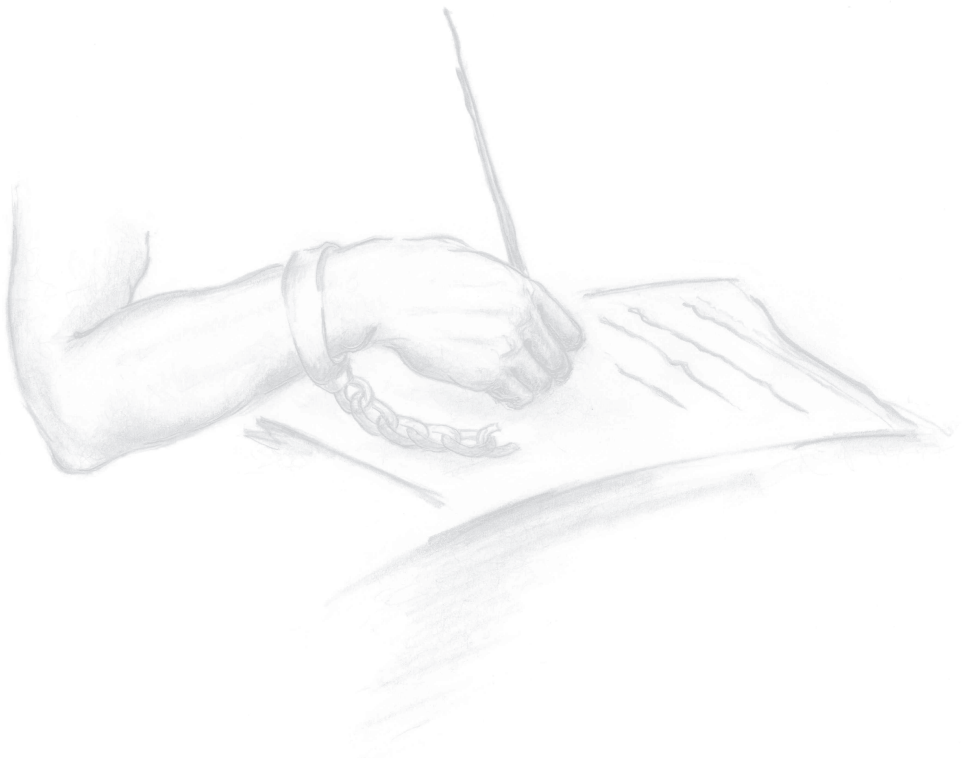


PART III

TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT



3.1 Introduction

The prohibition of torture and cruel, inhuman or degrading treatment or punishment is found in several Inter-American human rights treaties. First, the American Convention sets forth the right to humane treatment (in the Spanish version “personal integrity”) in Article 5. Article 5(1) ensures the right to physical, mental and moral integrity.²⁷⁹ The Inter-American Court has defined the scope of this right as one “that has several gradations and embraces treatment ranging from torture to other types of humiliation or cruel, inhuman or degrading treatment with varying degrees of physical and psychological effects caused by endogenous and exogenous factors which must be proven in each specific situation.”²⁸⁰ Article 5(2) prohibits torture and cruel, inhuman or degrading treatment and punishment and states that persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.²⁸¹ Articles 5(3) through 5(6) provide for additional protections for persons – including minors – deprived of their liberty as a result of a pending criminal proceeding or a conviction.²⁸²

The Inter-American Torture Convention sets forth the obligation of States parties to prevent and punish torture.²⁸³ The Belém do Pará Convention reaffirms the right of women not to be subjected to torture or other treatment that does not respect their personal integrity and dignity.²⁸⁴

Additionally, any conduct that constitutes torture or other cruel, inhuman or degrading treatment or punishment is arguably prohibited by the American Declaration as well. Although this instrument does not contain a specific prohibition of torture, it guarantees to every human being the rights to life, liberty and personal security in Article I.²⁸⁵ The Inter-American Commission has consistently ruled that the right to personal security includes the right to humane treatment and personal integrity.²⁸⁶ The American Declaration also enshrines the right to humane treatment for any person held in State

279 American Convention, *supra* note 16, art. 5(1).

280 *Loayza-Tamayo*, *supra* note 112, para. 57.

281 American Convention, *supra* note 16, art. 5(2).

282 *Id.*, arts. 5(3), (4), (5), (6).

283 Inter-American Torture Convention, *supra* note 23, art. 1.

284 Belém do Pará Convention, *supra* note 25, arts. 4(b), (d), (e).

285 American Declaration, *supra* note 12, art. I.

286 *See, e.g., Ovelario Tames v. Brazil*, Case 11.516, Report No. 60/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser. L/V/II.102 Doc. 6 rev. (1998), para. 39.

custody.²⁸⁷ Moreover, it provides for the right not to receive a cruel, infamous or unusual punishment when tried for a crime.²⁸⁸

Article 27 of the American Convention, which governs the suspension of rights in times of war, public danger or other emergency that poses a threat to the independence or security of a State party, specifically provides that the right to humane treatment guaranteed in Article 5 is non-derogable.²⁸⁹ Article 5 of the Inter-American Torture Convention establishes that the existence of a state of war, threat of war, state of emergency, domestic disturbance or other type of emergency cannot be invoked to justify the perpetration of acts that may be characterized as torture.²⁹⁰ The Inter-American Torture Convention's language appears to be more restrictive than that of the American Convention because it refers only to torture; however, the Court has clearly indicated that in the Inter-American System both the prohibition of torture and that of cruel, inhuman or degrading treatment and punishment are non-derogable.²⁹¹ The Court has concluded that, independent of existing international treaties and declarations, the prohibition of torture and other cruel, inhuman or degrading treatment and punishment has become a peremptory norm of international law, also known as a *jus cogens* norm.²⁹² In *Cantoral-Benavides*, the Court stated that regardless of whether certain acts constitute torture or cruel, inhuman and degrading treatment or both, "it must be clearly understood that... they are strictly prohibited under international human rights law."²⁹³

The Court has followed the European Court of Human Rights ("European Court") by specifying that the prohibition of torture applies even in the most difficult of circumstances for the State, including those involving aggression by terrorist groups or large-scale organized crime.²⁹⁴ The Court has expressly stated that "the fact that a State is confronted with terrorism [or a situation of internal upheaval] should not lead to restrictions on the protection of the physical integrity of the person."²⁹⁵ In addition, Article 5 of the Inter-American Torture Convention states that "[n]either the dangerous character of the detainee or prisoner, nor the lack of security of the prison establishment or penitentiary shall justify torture."²⁹⁶

287 American Declaration, *supra* note 12, art. XXV.

288 American Declaration, *supra* note 12, art. XXVI.

289 American Convention, *supra* note 16, art. 27.

290 Inter-American Torture Convention, *supra* note 23, art. 5.

291 *Lori Berenson-Mejía v. Peru*, Judgment of November 25, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 119, para. 100; *Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 123, para. 70.

292 *Caesar*, *supra* note 291, para. 100.

293 *Cantoral-Benavides*, *supra* note 171, para. 95.

3.2 Scope of the Right to Humane Treatment

Article 5(2) of the American Convention prohibits torture and cruel, inhuman, or degrading treatment and punishment. It further states that persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. This provision, however, does not contain a detailed definition of prohibited conduct. Article 2 of the Inter-American Torture Convention provides a definition of torture but does not distinguish it from other cruel, inhuman or degrading treatment or punishment. The following sections analyze the Inter-American case law relevant to the scope of the prohibition of torture and other cruel, inhuman or degrading treatment and punishment.

3.2.1 Torture

As stated above, torture is clearly forbidden in Inter-American human rights instruments. Nonetheless, the only definition of torture is found in Article 2 of the Inter-American Torture Convention.²⁹⁷ Thus, in establishing the scope of torture under the American Convention, the Court²⁹⁸ and Commission²⁹⁹ have relied on the Article 2 definition, which states as follows:

For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.

294 *Id.*, para. 95 (citing *Labita v. Italy*, Eur. Court H.R., April 6, 2000, para. 119; *Selmouni v. France*, Eur. Ct. H.R., No. 25803/94, July 28, 1999, para. 95; *Chahal v. United Kingdom*, Eur. Ct. H.R., No. 22414/93, November 15, 1996, Reports 1996-V, paras. 79, 80; *Tomasi v. France*, Eur. Court H.R., Ser. A Vol. 241-A, August 27, 1992, para. 115).

295 *Id.*, para. 96 (citing *Castillo-Petruzzi et al. v. Peru*, Judgment of May 30, 1999, Inter-Am. Ct. H.R., (Ser. C) No. 52, para. 197 and *Loayza-Tamayo*, *supra* note 112, para. 57); *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 155.

296 Inter-American Torture Convention, *supra* note 23, art. 5.

297 Inter-American Torture Convention, *supra* note 23, art. 2.

298 *Tibi v. Ecuador*, Judgment of September 7, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 114, para. 145; *Gómez-Paquiyaúri*, *supra* note 252, para. 105

299 *Raquel Martín de Mejía v. Peru*, Case 10.970, Report No. 5/96, Inter-Am. C.H.R., Annual Report 1995, OEA/Ser.L/V/II.91 Doc. 7 rev. (1996), p. 185.

The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

The Court has held that the Inter-American Torture Convention constitutes part of the Inter-American *corpus iuris*, and the Court must therefore refer to it in interpreting the scope and content of Article 5(2) of the American Convention.³⁰⁰ In some cases, the Court has also relied on Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in defining this provision.³⁰¹ On that basis, the Inter-American case law has established that for an act to constitute torture under Article 5(2), the following three elements must be present:³⁰²

1. a deliberate action or intentional act;
2. severe³⁰³ physical or mental pain or anguish suffered by the victim and
3. a purpose to perpetrate the torture.

In addition, in some of its case law, the Inter-American Commission has also required that the act must be perpetrated by a State agent or committed at his or her instigation, based on Article 3 of the Inter-American Torture Convention.³⁰⁴

Torture is not limited to physical violence; it may also be perpetrated through the infliction of psychological suffering or moral anguish.³⁰⁵ In *Urrutia*, the Court stated that

according to the circumstances of each particular case, some acts of aggression inflicted on a person may be classified as mental torture,

300 *Tibi*, *supra* note 298, para. 145.

301 *Maritza Urrutia*, *supra* note 252, para. 90; *Bámaca-Velásquez*, *supra* note 171, para. 156; *Cantoral-Benavides*, *supra* note 171, para. 183.

302 *See, e.g., Gómez-Paquiyaury*, *supra* note 252, paras.115-116; *Bámaca-Velásquez*, *supra* note 171, paras. 156-158; *Cantoral-Benavides*, *supra* note 171, paras. 97-98.

303 Unlike other international instruments that define torture, Article 2 of the Inter-American Torture Convention does not require that suffering be “severe” or reach a certain level of intensity. However, subsequent Inter-American case law has held that to classify an act as torture, the pain or suffering inflicted must indeed be severe or intense. *See, e.g., Caesar*, *supra* note 291, para. 50; *Luis Lizardo Cabrera v. Dominican Republic*, Case 10.832, Report No. 35/96, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 85. Nevertheless, the level of “severity” required remains unclear, blurring the line that distinguishes torture from other forms of ill-treatment.

304 *Luis Lizardo Cabrera*, *supra* note 303, para. 75; *Raquel Martín de Mejía*, *supra* note 299, p. 185.

305 *Bámaca-Velásquez*, *supra* note 171, para. 150; *Cantoral-Benavides*, *supra* note 171, para. 100.

particularly acts that have been prepared and carried out deliberately against the victim to eliminate his mental resistance and force him to accuse himself of or confess to certain criminal conducts, or to subject him to other punishments, in addition to the deprivation of freedom itself.³⁰⁶

Under Article 2 of the Inter-American Torture Convention, “torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish.”³⁰⁷

The Court is in agreement with the European Court’s view that the definition of torture is subject to ongoing reassessment in light of present-day conditions and the changing values of democratic societies. Therefore,

certain acts that were classified in the past as inhuman or degrading treatment, but not as torture, may be classified differently in the future, that is, as torture, since the growing demand for the protection of fundamental rights and freedoms must be accompanied by a more vigorous response in dealing with infractions of the basic values of democratic societies.³⁰⁸

3.2.2 Cruel, Inhuman and Degrading Treatment or Punishment

Neither Article 5(2) of the American Convention nor Article 2 of the Inter-American Torture Convention defines cruel, inhuman and degrading treatment and punishment. In *Caesar*, the Court cited the Trial Chamber of the International Criminal Tribunal for the Former Yugoslavia in *Celibici*, which defined cruel or inhuman treatment as “an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, that causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity.”³⁰⁹ The Court has followed European human rights case law and has concluded that the essential criterion for distinguishing torture from other cruel, inhuman or degrading treatment or punishment is the intensity of the suffering.³¹⁰

306 *Maritza Urrutia*, *supra* note 252, para. 93.

307 Inter-American Torture Convention, *supra* note 23, art. 2.

308 *Cantoral-Benavides*, *supra* note 171, para. 99 (referring to *Selmouni v. France*, *supra* note 294, para. 101).

309 *Caesar*, *supra* note 291, para. 68.

310 *Id.*, para 50.

According to the Commission, the American Convention and the Inter-American Torture Convention allow it certain latitude to assess, in light of the seriousness or intensity of an act or practice, whether or not the act or practice constitutes torture or other cruel, inhuman and degrading treatment.³¹¹ The “intensity” of the suffering is relative and requires a case-by-case analysis that encompasses all the circumstances of the particular situation, including the duration of the treatment, the physical and mental consequences, the sex, the age and the health of the victim, among other factors.³¹² For example, the Court has consistently indicated that in the case of minors a higher standard of scrutiny must be applied when analyzing whether a particular act constitutes torture.³¹³ Similarly, the Commission in *Jailton Neri Da Fonseca v. Brazil* stated that “in the case of children the highest standard must be applied in determining the degree of suffering, taking into account factors such as age, sex, the effect of the tension and fear experienced, the status of the victim’s health, and his maturity, for instance.”³¹⁴ The Commission has also applied a heightened standard with regard to persons with mental disabilities.³¹⁵

With respect to degrading treatment, in *Loayza Tamayo*³¹⁶ the Court stated that “[t]he degrading aspect is characterized by the fear, anxiety and inferiority induced for the purpose of humiliating and degrading the victim and breaking his physical and moral resistance.”³¹⁷ The Commission reasoned similarly in the case of *Lizardo Cabrera*.³¹⁸

3.2.3 “[R]espect for the Inherent Dignity of the Human Person”

Article 5(2) ensures the right of all persons deprived of their liberty to be treated “with respect for the inherent dignity of the human person.”³¹⁹ Although in some cases the Court and the Commission have found violations of the right

311 *Luis Lizardo Cabrera*, *supra* note 303, para. 82.

312 *Gómez-Paquiyaúri*, *supra* note 252, para. 113.

313 *Children’s Rehabilitation v. Paraguay*, Judgment of September 2, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 112, para. 162; *Gómez-Paquiyaúri*, *supra* note 252, para. 117; *Bulacio*, *supra* note 248, para. 98.

314 *Jailton Neri Da Fonseca v. Brazil*, Case 11.634, Report No. 33/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 64.

315 *Victor Rosario Congo v. Ecuador*, Case 11.427, Report No. 63/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 58.

316 *Loayza-Tamayo*, *supra* note 112.

317 *Id.*, para. 57.

318 *Luis Lizardo Cabrera*, *supra* note 303, para. 77.

319 American Convention, *supra* note 16, art. 5(2).

to respect for “personal dignity,” existing case law does not clearly define the scope of this right.³²⁰ The Commission, for example, has stated that

[a]mong the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of the human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect... [The guarantees of Article 5(1) and (2)] presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty.³²¹

Consistent with this principle, Inter-American case law makes clear that the State, as the institution responsible for detention facilities, must guarantee respect for the rights of prisoners under its absolute control.³²² According to the Commission, “the act of imprisonment carries with it a specific and material commitment to protect the prisoner’s human dignity so long as the individual is in the custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.”³²³ The Court applied the same reasoning in *Children’s Rehabilitation* in its consideration of State duties to minors deprived of their liberty.³²⁴

In this context, the Court and the Commission have consistently found that prolonged isolation and forced incommunicado detention violate the right to

320 *De la Cruz-Flores v. Peru*, Judgment of November 18, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 115, para. 131; *Tibi*, *supra* note 298, para. 152; *Víctor Rosario Congo*, *supra* note 315, para. 59; *Loren Laroye Riebe Star et al. v. Mexico*, Case 11.610, Report No. 49/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 92; *Donnason Knights v. Grenada*, Case 12.028, Report No. 47/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 117.

321 *Donnason Knights*, *supra* note 320, para. 81; *see also*, *Leroy Lamey et al. v. Jamaica*, Cases 11.826, 11.843, 11.846, 11.847, Report No. 49/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 134; *Rudolph Baptiste v. Grenada*, Case 11.743, Report No. 38/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 89.

322 *Tibi*, *supra* note 298, para. 150; *Bulacio*, *supra* note 248, para. 126; *Cantoral-Benavides*, *supra* note 171, para. 87; *Durand and Ugarte v. Peru*, Judgment of August 16, 2000, Inter-Am. Ct. H.R., (Ser. C) No. 68, para. 69; *Minors in Detention v. Honduras*, Case 11.491, Report No. 41/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 134.

323 *Minors in Detention v. Honduras*, *supra* note 322, para. 135.

324 *Children’s Rehabilitation*, *supra* note 313, para. 153.

respect for personal dignity.³²⁵ Persons detained illegally are especially vulnerable and therefore are more likely to experience a violation of this right.³²⁶ The Court has also found that any use of force that is not strictly required to restrain a prisoner infringes on his or her human dignity.³²⁷

With respect to conditions of detention, the Court in *Tibi* found that the conditions endured by the victim failed to respect his personal dignity.³²⁸ Mr. Tibi was detained in a severely overcrowded penitentiary, without sufficient ventilation or light, with no food or place to sleep for 45 days.³²⁹ The Commission in *Congo* concluded that the isolation of a detained person suffering from mental illness, which left him unable to feed or clean himself or meet his other basic needs, violated his right to respect for the inherent dignity of the human person.³³⁰

Regarding the medical treatment of prisoners, the Court in *De la Cruz Flores* concluded that the lack of adequate medical attention violated the victim's right to respect for her personal dignity under Article 5.³³¹ In two other cases, however, the Court reviewed the lack of adequate medical attention provided to the detained victims and found that the responsible authorities had failed to comply with the minimum standards required by the right to humane treatment, but did not specify whether they had also failed to respect the victims' inherent human dignity.³³²

The Court has found that certain methods of arrest violate this right. In *Castillo-Paéz*, for example, the Court ruled that placing a detainee in the trunk of an official vehicle *per se* violates this right, even if no other physical or other maltreatment is involved.³³³ The Court subsequently applied this ruling in *Street Children* and *Gómez-Paquiyaury*.³³⁴

325 *Castillo-Petruzzi*, *supra* note 295, para. 194; *Velásquez-Rodríguez*, *supra* note 187, para. 156; *Martín Javier Roca Casas v. Peru*, Case 11.233, Report No. 39/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 89; *Camilo Alarcon Espinoza et al. v. Peru*, Cases 10.941, 10.942, 10.944, 10.945, Report No. 40/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 83.

326 *Bulacio*, *supra* note 248, para. 127; *Bámaca-Velásquez*, *supra* note 171, para. 150; *Street Children*, *supra* note 27, para. 166.

327 *Castillo-Petruzzi*, *supra* note 295, para. 197; *Loayza-Tamayo*, *supra* note 112, para. 57.

328 *Tibi*, *supra* note 298, para. 152.

329 *Id.*, para. 151.

330 *Víctor-Rosario Congo*, *supra* note 315, para. 59.

331 *De la Cruz-Flores*, *supra* note 320, para. 131.

332 *Tibi*, *supra* note 298, para. 157; *Bulacio*, *supra* note 248, para. 131.

333 *Castillo-Paéz*, *supra* note 243, para. 66.

334 *Street Children*, *supra* note 27, para. 164; *Gómez-Paquiyaury*, *supra* note 252, para. 109.

In various cases related to mandatory death sentences in certain Caribbean States, the Commission stated in each case that it

cannot reconcile the essential respect for the dignity of the individual that underlies Article 5(1) and (2) of the Convention, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case.³³⁵

On this basis the Commission found violations of the right to personal dignity protected in Article 5(2).³³⁶

3.3 Specific Acts and Situations

Inter-American case law has classified certain acts and situations as torture or cruel, inhuman or degrading treatment on the basis of their nature and the suffering they inflict on victims. The following subsections provide a detailed analysis of these acts and situations, as reflected in the jurisprudence of the Inter-American Court and Commission.

3.3.1 Discipline and Corporal Punishment

As noted above, the Court has ruled in several cases that any use of force that is not strictly necessary to ensure a prisoner's proper behavior constitutes a violation of his or her right to personal dignity as protected by Article 5 of the American Convention.³³⁷

The Court concluded in *Caesar* that corporal punishment is *per se* incompatible with Article 5(1) and (2) of the American Convention because of its inherently cruel, inhuman and degrading nature.³³⁸ The Court reached this conclusion on the basis of existing international human rights law and humanitarian law provisions as well as international and domestic case law and practice.³³⁹

335 *Donnason Knights*, *supra* note 320, para. 82; *Leroy Lamey*, *supra* note 321, para. 135; *Rudolph Baptiste*, *supra* note 321, para. 90.

336 *Donnason Knights*, *supra* note 320, para. 89; *Leroy Lamey*, *supra* note 321, para. 143; *Rudolph Baptiste*, *supra* note 321, para. 97.

337 *See* Section 3.2.3, *supra*.

338 *Caesar*, *supra* note 291, para. 70.

339 *Id.*, paras. 58, 60-66, 70.

The victim in *Caesar* was convicted of attempted rape under Trinidad and Tobago's Offenses against the Person Act and was sentenced to 20 years in a penitentiary with hard labor and 15 strokes of the cat-o-nine tails.³⁴⁰ The cat-o-nine tails

consists of a plaited rope instrument of nine knotted thongs of cotton cord, each of which is approximately 30 inches long and less than one quarter of an inch in diameter. The thongs are attached to a handle. The nine cotton thongs are lashed across the back of the subject, between the shoulders and the lower area of the spine.³⁴¹

The Court found that this instrument is designed to inflict "severe physical and psychological suffering."³⁴² It therefore concluded that the practice of flogging with the cat-o-nine tails reflected the institutionalization of State violence and constituted a form of torture in violation of Articles 5(1) and (2) of the American Convention.³⁴³

The Court further found that the degree of suffering experienced by Mr. Caesar was aggravated by the treatment he received before and after the flogging.³⁴⁴ In particular, over a period marked by undue delay, he suffered anguish, stress and fear while awaiting the punishment, and he was exposed to the suffering of other prisoners who had been flogged.³⁴⁵ He also experienced extreme humiliation due to the flogging itself.³⁴⁶

3.3.2 Rape

The Court has never expressly addressed the question whether rape constitutes a form of torture under Article 5. In *Loayza Tamayo* the victim alleged that she was brutally raped and mistreated while detained by the Peruvian authorities.³⁴⁷ The Court found that there was insufficient evidence to sustain the rape allegation and therefore did not rule on the issue of rape as a violation of the

340 *Id.*, para. 49(3).

341 *Id.*, para. 49(8).

342 *Id.*, para. 72.

343 *Id.*, para. 73.

344 *Id.*, para. 87.

345 *Id.*, para. 88.

346 *Id.*

347 *Loayza-Tamayo*, *supra* note 112, para. 58.

right to humane treatment.³⁴⁸ The Court did, however, hold that other substantiated mistreatment suffered by the victim breached Article 5.³⁴⁹ *Loayza Tamayo* illustrates the difficulties victims face in proving violations that do not necessarily leave physical marks and for which documentary evidence, such as medical examination reports, is difficult to obtain.

On the other hand, the Inter-American Commission has consistently found that rape is a form of torture. In *Martín de Mejía*,³⁵⁰ the Commission stated that “rape is a physical and mental abuse that is perpetrated as a result of an act of violence... Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community.”³⁵¹

Rape survivors generally suffer psychological trauma as a result of being humiliated and victimized.³⁵² For some this trauma may be aggravated by “the condemnation of the members of their community if they report [that they have been raped or sexually assaulted].”³⁵³

In *Martín de Mejía*, the Commission found that the facts satisfied all the elements required for an act to constitute torture under the Inter-American Torture Convention definition.³⁵⁴ First, the rape had caused the victim physical and mental pain and suffering.³⁵⁵ Second, the rape was committed intentionally to intimidate the victim and punish her for her husband’s political views.³⁵⁶ Finally, the rape was perpetrated by a member of the security forces accompanied by a group of soldiers, which satisfied the State involvement or acquiescence element.³⁵⁷ The Commission also stated that “sexual abuse, besides being a violation of the victim[s]’ physical and mental integrity, implies a deliberate outrage to their dignity,” in violation of Article 11 of the American Convention.³⁵⁸

348 *Id.*

349 *Id.*

350 *Raquel Martín de Mejía*, *supra* note 299, p. 157.

351 *Id.*, p. 186 (citing Blatt, Deborah, “Recognizing Rape as a Method of Torture,” 19 *N.Y.U. Rev. L. & Soc. Change* 821, 854 (1992)).

352 *Id.* (citing Blatt, p. 855).

353 *Id.* (citing Blatt, p. 855).

354 *Id.*, p. 185.

355 *Id.*, p. 186.

356 *Id.*, pp. 186-187.

357 *Id.*, p. 187.

358 *Id.*

More recently, in *González Pérez* the Commission found that sexual violence against civilians committed by members of the security forces constituted a serious violation of the rights protected under Articles 5 and 11 of the American Convention.³⁵⁹ To support its finding, the Commission cited the International Criminal Tribunal for the Former Yugoslavia's decisions in *Celebici* and *Furundzija*; in these decisions the Tribunal declared that rape and other forms of sexual assault constitute torture and are prohibited by international law.³⁶⁰ The Commission also quoted the United Nations Special Rapporteur on Violence against Women, who had reported that "the consequences of sexual violence are physically, emotionally and psychologically devastating for women victims."³⁶¹ In addition, the United Nations Special Rapporteur on Torture had found that rape can be used as a method to punish, intimidate and humiliate.³⁶² The Commission additionally pointed out that the Belém do Pará Convention "guarantees all women the right to a life free of violence."³⁶³ Ultimately, the Commission followed its precedent in *Martín de Mejía* and ruled that the rape perpetrated against the three indigenous women in *González Pérez* constituted torture.³⁶⁴ The Commission also concluded that the rape affected the private lives of the victims and their family, "which led them to flee their community in a situation of fear, shame and humiliation."³⁶⁵

3.3.3 Forced Disappearances and Extrajudicial Executions

The Court recently applied Article II of the Inter-American Convention on Forced Disappearance of Persons to define forced disappearance as:

the act of depriving a person or persons of his [sic] or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information or a refusal

359 *González Pérez*, *supra* note 231, paras. 45-54.

360 *Id.*, paras. 45, 49.

361 *Id.*, para. 45 (citing Ryan, Samantha I., "From the Furies of Nanking to the Eumenides of the International Criminal Court; The Evolution of Sexual Assaults as International Crimes," 11 *Pace Int'l L. Rev.* 447 (1999); Coomaraswamy, Radhika, *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1998/54, United Nations, January 26, 1998, paras. 13-14).

362 *Id.*, para. 48 (citing *Report on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc. E/CN.4/1986/15, United Nations, February 19, 1986, paras. 119, 431).

363 *Id.*, para. 46.

364 *Id.*, para. 52.

365 *Id.*

to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.³⁶⁶

The Court and the Commission consider forced disappearance to be a multiple and continuing violation of a number of rights protected by the Convention.³⁶⁷ This is not only because forced disappearance arbitrarily deprives the victim of liberty, but also because it endangers her or his personal integrity, safety and life.³⁶⁸ The victim is completely defenseless, which may easily result in further abuses.³⁶⁹ Forced disappearance according to the Court denotes “a disregard of the duty to organize the apparatus of the State in such a manner as to guarantee the rights recognized in the Convention.”³⁷⁰ Because of the difficulties in obtaining evidence in such cases,

the Court has established that if it has been proved that the State promotes or tolerates the practice of forced disappearance of persons, and the case of a specific person can be linked to this practice, either by circumstantial or indirect evidence, or both, or by pertinent logical inference, then the specific disappearance may be considered to have been proven.³⁷¹

In cases of forced disappearances, Inter-American jurisprudence has considered prolonged isolation and forced incommunicado detention to be *per se* cruel and inhuman treatment.³⁷² Moreover, in *Velásquez-Rodríguez* and

366 Convention on Forced Disappearance, *supra* note 24; *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 126.

367 *See Bámaca-Velásquez*, *supra* note 171, para. 128; *see also*, *Blake*, *supra* note 242, para. 65; *Fairén-Garbi*, *supra* note 187, para. 147; *Godínez-Cruz*, *supra* note 187, paras. 163, 166; *Velásquez-Rodríguez*, *supra* note 187, paras. 155, 158; *Luis Gustavo Marroquín v. Guatemala*, Case 8075, Report No. 54/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996), para. 22; *Ileana del Rosario Solares Castillo et al. v. Guatemala*, Case 9111, Report No. 60/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 31.

368 *Bámaca-Velásquez*, *supra* note 171, para. 128.

369 *Id.*

370 *Id.*, para. 129; *see also*, *Godínez-Cruz*, *supra* note 187, para. 165; *Velásquez-Rodríguez*, *supra* note 187, para. 158.

371 *Bámaca-Velásquez*, *supra* note 171, para. 130 (footnotes omitted); *see also*, *Blake*, *supra* note 242, paras. 47, 49; *Fairén-Garbi*, *supra* note 187, paras. 129-133; *Godínez-Cruz*, *supra* note 187, paras. 132-137; *Velásquez-Rodríguez*, *supra* note 187, paras. 126-131.

372 *Bámaca-Velásquez*, *supra* note 171, para. 150; *Amparo Tordecilla Trujillo v. Colombia*, Case 10.337, Report No. 7/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 37; *see also*, *Ileana del Rosario Solares Castillo et al. v. Guatemala*, *supra* note 367, para. 31; *Tarcisio Medina Charry v. Colombia*, Case 11.221, Report No. 3/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 67-68; *Martín Javier Roca*, *supra* note 325, para. 89; *Godínez-Cruz*, *supra* note 187, para. 163; *Velásquez-Rodríguez*, *supra* note 187, para. 156.

Godínez-Cruz, the Court ruled that in cases where a “disappeared person” is detained by authorities shown to practice torture or other cruel, inhuman or degrading treatment, even if there is no direct evidence that the victim suffered any mistreatment, a violation of Article 5 may be found.³⁷³ Such a finding is based on the State’s failure to ensure Article 5 rights, as required by Article 1(1) of the American Convention.³⁷⁴

The Commission concluded in one of various cases of forced disappearance in Peru that

[t]he circumstances in which the victims were detained, kept hidden, isolated, and in solitary confinement, and their defenselessness as a result of being denied and prevented from exercising any form of protection or safeguards of their rights make it perfectly feasible for the armed forces to have tortured the victims with a view to extracting information about subversive groups or units. Accordingly, the Commission concludes that the Peruvian State violated the rights guaranteed to the victims under Article 5 of the Convention.³⁷⁵

It is important to note that this and similar cases against Peru occurred between 1989 and 1993, a period during which the Commission found that there was a practice of forced disappearances carried out by State agents as part of a “fight against subversion.”³⁷⁶ In cases where there is direct evidence, such as witness testimony, that a victim of forced disappearance was subject to torture or other cruel, inhuman or degrading treatment or punishment, both the Court and the Commission have shifted the burden of proof to the State to rebut these allegations; if the State failed to rebut them, the Commission and the Court presumed the allegations to be true.³⁷⁷

Additionally, the Court and the Commission have presumed the veracity of allegations of torture or other cruel, inhuman or degrading treatment in

373 *Godínez-Cruz*, *supra* note 187, para. 197; *Velásquez-Rodríguez*, *supra* note 187, para. 187.

374 *Godínez-Cruz*, *supra* note 187, para. 197; *Velásquez-Rodríguez*, *supra* note 187, para. 187.

375 *William Leon Laurente et al. v. Peru*, Cases 10.807, 10.808, 10.809, 10.810, 10.878, 11.307, Report No. 54/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 112; *see also*, *David Palomino Morales et al. v. Peru*, Cases 10.551, 10.803, 10.821, 10.906, 11.180, 11.322, Report No. 53/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para.114; *Raúl Zevallos Loayza et al. v. Peru*, Cases 10.544, 10.745, 11.098, Report No. 52/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 88; *Anetro Castillo et al. v. Peru*, Cases 10.471, 11.014, 11.067, Report No. 51/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.95 Doc. 7 rev. (1998), para. 112.

376 *Palomino Morales*, *supra* note 375, para. 77.

377 *Bámaca-Velásquez*, *supra* note 171, paras. 152-153; *Manuel García Franco v. Ecuador*, Case 10.258, Report No. 1/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 63.

extrajudicial execution cases where it is established that a victim was illegally detained by State agents and where the conditions in which his or her remains are found indicate severe mistreatment.³⁷⁸ The underlying logic is that once the victim is under the absolute control of State officials, the State bears the burden of proving that she or he was not subjected to prohibited treatment while in its custody. If the State cannot rebut that presumption, the Commission and the Court will likely find a violation of Article 5 of the American Convention.³⁷⁹ The basis for such a finding is even stronger if it is demonstrated that there is a pattern of torturing prisoners in the respondent State.³⁸⁰

The Court and Commission have also found violations of the right not to be tortured or subjected to cruel, inhuman or degrading treatment in extrajudicial execution cases on the basis of the extreme suffering experienced by victims.³⁸¹ These findings recognize that such victims, once detained, must live with uncertainty as to their fate or with the knowledge of their impending death.³⁸²

3.3.4 Suffering by Family Members as Torture or Other Cruel, Inhuman or Degrading Treatment

The Court has consistently ruled that family members of victims of disappearance and extrajudicial executions experience a violation of their right not to be subjected to torture or other cruel, inhuman or degrading treatment as a direct consequence of the treatment of their loved ones.³⁸³ The Court in several cases has characterized the suffering and anguish inflicted upon victims' families as

378 *Juan Humberto Sánchez*, *supra* note 249, paras. 99-100; *Street Children*, *supra* note 27, paras. 157-160, 166, 168; *Remigio Domingo Morales et al.*, *supra* note 247, paras. 133-135; *et al.*, *Joaquín Ortega*, *supra* note 248, paras. 250-252.

379 *Juan Humberto Sánchez*, *supra* note 249, para. 100; *Street Children*, *supra* note 27, paras. 169-170; *Joaquín Ortega*, *supra* note 248, paras. 253-254.

380 *Juan Humberto Sánchez*, *supra* note 249, para. 97; *Street Children*, *supra* note 27, paras. 167, 170; *see also*, *Joaquín Ortega*, *supra* note 248, paras. 229-38, 254.

381 *Street Children*, *supra* note 27, paras. 162-163; *19 Merchants v. Colombia*, Judgment of July 5, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 109, para. 150; *Prada González y Bolaño Castro v. Colombia*, Case 11.710, Report No. 63/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 34; *Jailton Neri da Fonseca*, *supra* note 314, para. 63.

382 *Street Children*, *supra* note 27, paras. 162-163, 168; *19 Merchants*, *supra* note 381, para. 150; *Prada González y Bolaño Castro*, *supra* note 381, para. 34; *Jailton Neri da Fonseca*, *supra* note 314, paras. 63-66.

383 *Bámaca-Velásquez*, *supra* note 171, para. 129; *Blake*, *supra* note 242, paras. 113-114; *Street Children*, *supra* note 27, paras. 174-174.

cruel, inhuman or degrading treatment.³⁸⁴ In *19 Merchants*, the Court restricted the definition of “family member” to those with a close relationship to the victim.³⁸⁵ Therefore, the nephew and the niece of two of the victims in the case were not considered “family members.”³⁸⁶ In *Children’s Rehabilitation* the Court stated that only those who shared a relationship of personal affection and closeness with the victims, such as parents and siblings, could themselves be considered victims of an Article 5 violation as a direct consequence of the treatment of the children in this case.³⁸⁷

The Court has deemed the following to be causes of severe suffering and anguish among victims’ families: the lack of information regarding the victims’ whereabouts, the obstruction of justice and the lack of appropriate investigation and punishment of the perpetrators.³⁸⁸ The Court has also ruled that State negligence in identifying the bodies, notifying the families and mishandling the victims’ remains violates family members’ right to physical and mental integrity.³⁸⁹ In *Mack*, the Court considered the threats and harassment suffered by the victim’s family members to be a direct result of their efforts to obtain justice in the case, as well as the pattern of obstruction of criminal investigations, including the murder of a police investigator and threats to and harassment of witnesses.³⁹⁰ The Court found that all of these factors caused the family constant anguish, “feelings of frustration and powerlessness and a deep fear of suffering the same pattern of violence fostered by the State.”³⁹¹ On the foregoing basis the Court ruled that the State violated the family’s right to physical and mental integrity under Article 5 of the American Convention.³⁹²

With the exception of its decisions in *Tibi* and *De la Cruz-Flores*,³⁹³ the Court has generally not classified the suffering of family members of those illegally detained, or even those sentenced to death without due process, as a violation

384 *19 Merchants*, *supra* note 381, paras. 215-17; *Juan Humberto Sánchez*, *supra* note 249, paras. 101-102; *Gómez Paquiyauri*, *supra* note 252, para. 118.

385 *19 Merchants*, *supra* note 383, para. 218.

386 *Id.*

387 *Children’s Rehabilitation*, *supra* note 313, para. 191.

388 *Id.*; *Bámaca-Velásquez*, *supra* note 171, paras. 165-66; *Blake*, *supra* note 242, paras. 113-115.

389 *Street Children*, *supra* note 27, para. 173.

390 *Myrna Mack-Chang v. Guatemala*, Judgment of November 25, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 101, para. 232.

391 *Id.*

392 *Id.*, para. 233.

393 *De la Cruz-Flores*, *supra* note 320, para. 135-136; *Tibi*, *supra* note 298, paras. 161-162.

of Article 5 of the American Convention.³⁹⁴ In *Urrutia*, the Court recognized the suffering and anguish endured by the victims' families and stated that "therefore, it will take this circumstance into consideration when establishing reparations,"³⁹⁵ and the Court ruled similarly in *Cantoral-Benavides*.³⁹⁶ However, the Court in these cases did not find a violation of the right to humane treatment protected in Article 5 of the Convention.³⁹⁷

In *Moiwana Village*, the Court found that the events that transpired in this case had caused emotional, psychological, spiritual and economic suffering to the members of the victims' community, thereby violating those members' rights under Article 5(1) of the American Convention.³⁹⁸ In this case the Court was willing to expand the applicability of Convention rights beyond family members, to the victims' entire community.

The Moiwana Community was founded near the end of the nineteenth century by members of the N'djuka people.³⁹⁹ The N'djuka descended from slaves brought to Suriname to work on the country's plantations.⁴⁰⁰ Many of these slaves were able to escape to the eastern region of Suriname where they founded new and autonomous communities.⁴⁰¹ Six communities emerged from these escaped slaves, known as Maroons, and the N'djuka was one of these groups.⁴⁰²

In 1986, during a time of political instability marked by a conflict between State forces and an armed group known as the Jungle Commando, the Moiwana Community was the object of a military operation that resulted in thirty-nine civilian deaths and the destruction of all the community's property.⁴⁰³ The survivors were forced to flee the village to French Guyana.⁴⁰⁴ Since the attack, the village has remained abandoned.⁴⁰⁵ The members of the community have been unable to recover the remains of their loved ones in order to

394 See *Fernín Ramírez v. Guatemala*, Judgment of June 20, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 126, para. 120; *Maritza Urrutia*, *supra* note 252, para. 97; *Cantoral-Benavides*, *supra* note 171, para. 105.

395 *Maritza Urrutia*, *supra* note 252, para. 97.

396 *Cantoral-Benavides*, *supra* note 171, para. 105.

397 *Maritza Urrutia*, *supra* note 252, para. 97; *Cantoral-Benavides*, *supra* note 171, para. 105.

398 *Moiwana Village v. Suriname*, Judgment of June 15, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 124, para. 103.

399 *Id.*, para. 86.11.

400 *Id.*, para. 86.1.

401 *Id.*

402 *Id.*

403 *Id.*, para. 86.15.

404 *Id.*, para. 86.18.

405 *Id.*, para. 86.19.

bury them according to the principles of the N'djuka culture.⁴⁰⁶ Notwithstanding the community's efforts to obtain redress, the State has not investigated or punished the perpetrators of the massacre.⁴⁰⁷

In light of these facts, the Court concluded that the lack of proper investigation, together with the impossibility of recovering the victims' bodies for purposes of appropriate burial, harmed the surviving members of that Community as a whole.⁴⁰⁸ Furthermore, the fact that members of the Community had to flee to save their lives forced their separation from their traditional land, and this was found to result in a violation of the right to physical and mental integrity under Article 5(1) of the American Convention.⁴⁰⁹

Like the Court, the Commission has found that family members of disappeared persons experience mental torture, in the form of agonizing uncertainty as to whether their loved ones are still alive and where they are being held.⁴¹⁰ In *González Pérez*, the Commission concluded that the victims' mother, who witnessed the rape of her three daughters by members of the Mexican Armed Forces, suffered a violation of her right to humane treatment.⁴¹¹ In addition to witnessing the rape of her daughters, she had to endure ostracism from her community, which the Commission characterized as a form of humiliation and degradation in violation of Article 5 of the American Convention.⁴¹² In *Aguas Blancas*, the Commission found that farmworkers present while police summarily executed other rural workers suffered serious psychological harm as a result of the violent acts they witnessed and the accompanying fear for their own lives.⁴¹³

3.3.5 Threats

In keeping with the case law of the European Court, the Court and Commission have stated that the mere threat of conduct prohibited by Article 5 of the American Convention, when the threat is sufficiently real and

406 *Id.*, para. 86.20.

407 *Id.*, para. 86.33.

408 *Id.*, paras. 94-97, 98-100.

409 *Id.*, paras. 101-103.

410 *Samuel De La Cruz Gómez v. Guatemala*, Case 10.606, Report No. 11/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 47.

411 *González Pérez*, *supra* note 231, para. 53.

412 *Id.*

413 *Tomas Porfirio Rondin v. Mexico* ("*Aguas Blancas*" Case), Case 11.520, Report No. 49/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 76.

imminent, may in itself constitute a violation of that provision.⁴¹⁴ The Court and the Commission have concluded that “creating a threatening situation or threatening an individual with torture may, at least in some circumstances, constitute inhuman treatment.”⁴¹⁵ In *Tibi* and *Urrutia*, the Court stated that a threat or real risk of being subjected to physical mistreatment causes, in certain circumstances, severe anguish amounting to psychological torture.⁴¹⁶

The Commission also concluded that victims of a practice of extrajudicial execution in Guatemala were brutally tortured before being executed in order to instill extreme fear in members of their communities regarding potential involvement with subversive groups.⁴¹⁷ In *Loren Laroye Riebe Star*, the Commission found that the fear experienced by three priests when illegally detained by heavily armed State officials, compounded by the humiliating treatment they received while in custody, amounted to a violation of Article 5 of the American Convention.⁴¹⁸

3.3.6 Conditions of Detention

As stated above, under Article 5(2) any person deprived of his or her liberty has the right to be detained in conditions that are respectful of his or her personal dignity.⁴¹⁹ Because it is “responsible for detention establishments, [the State] is the guarantor of the rights of detainees.”⁴²⁰

When a State deprives an individual of his or her liberty, it confines that individual in an institution

where the various aspects of his [sic] life are subject to an established regime; where the prisoner is removed from his natural and social milieu; where the established regime is one of absolute control, a loss of privacy, limitation of living space and, above all, a radical decline in the individual’s means of defending himself. All this means that the act

414 *19 Merchants*, *supra* note 381, para. 149; *Cantoral-Benavides*, *supra* note 171, para. 102; *Street Children*, *supra* note 27, para. 165; *Prada González*, *supra* note 381, para. 34.

415 *Street Children*, *supra* note 27, para. 165; *see also*, *Prada González*, *supra* note 381, para. 34.

416 *Tibi*, *supra* note 298, para. 147; *Maritza Urrutia*, *supra* note 252, para. 92.

417 *Remigio Domingo Morales et al.*, *supra* note 247, para. 134.

418 *Loren Laroye Riebe Star*, *supra* note 320, paras. 89-92.

419 *See* Section 3.2.3, *supra*.

420 *See Hilaire*, *supra* note 185, para. 165; *see also*, *Cantoral-Benavides*, note 171, para. 87; *Neira Alegría, et al. v. Peru*, Judgment of January 19, 1995, Inter-Am. Ct. H.R., (Ser. C) No. 20, para. 60.

of imprisonment carries with it a specific and material commitment to protect the prisoner's human dignity so long as that individual is in custody of the State, which includes protecting him from possible circumstances that could imperil his life, health and personal integrity, among other rights.⁴²¹

Consequently, though deprivation of liberty entails legitimate restrictions of certain rights, the infliction of injury, unnecessary suffering or damage to health which results in the deterioration of physical, psychological or moral integrity may constitute cruel treatment in violation of Article 5(2) of the American Convention.⁴²² Furthermore, the State, when exercising its duty to protect the well-being of prisoners, must take into account any special vulnerability of a detained person, for instance, that of minors or mentally disabled persons.⁴²³

With regard to specific conditions that by their nature violate prisoners' rights, the Court in *Suárez Rosero* found that being held in a damp, underground cell measuring approximately 15 square meters with 16 other prisoners, without necessary hygiene facilities and only newspapers to sleep on, constituted cruel, inhuman and degrading treatment.⁴²⁴ In several cases regarding prisoners convicted of terrorism or related charges in Peru, the Court consistently held that the prison conditions imposed by the applicable antiterrorist legislation constituted cruel, inhuman and degrading treatment in violation of Article 5 of the American Convention.⁴²⁵ These conditions included prolonged solitary confinement, detention in small, overcrowded cells with no natural light, inadequate ventilation, no place to sleep, lack of sufficient food and restrictive visiting schedules.⁴²⁶

Additionally, the Court has ruled that a lack of appropriate and regular medical and psychological treatment equals a violation of the right to humane treatment.⁴²⁷ In two cases in which the victims were detained without conviction, the Court held that the State should allow detainees to receive medical treatment from a doctor of their choice and share with the judge, the detainee

421 *Minors in Detention*, *supra* note 322, para. 135.

422 *Lori Berenson-Mejía*, *supra* note 291, para. 101.

423 *Bulacio*, *supra* note 248, para. 126; *Víctor-Rosario Congo*, *supra* note 315, paras. 53-54.

424 *Suárez Rosero*, *supra* note 203, para. 91.

425 *See Lori Berenson-Mejía*, *supra* note 291, para. 108; *Castillo-Petruzzi*, *supra* note 295, para. 198; *Loayza-Tamayo*, *supra* note 112, para. 58.

426 *Lori Berenson-Mejía*, *supra* note 291, para. 106; *Cantoral-Benavides*, *supra* note 171, para. 85.

427 *Tibi*, *supra* note 298, para. 157; *Children's Rehabilitation*, *supra* note 313, para. 166.

and his or her lawyer the results of any examinations conducted.⁴²⁸ More recently, the Court issued a similar ruling in *De la Cruz-Flores*, in which a doctor was convicted under the Peruvian antiterrorist legislation in force during the 1990s.⁴²⁹

The Inter-American Commission has utilized the United Nations Standard Minimum Rules for the Treatment of Prisoners⁴³⁰ in assessing whether detention conditions comply with Article 5 of the American Convention, specifically regarding accommodation, hygiene, exercise, medical treatment, religious services and library facilities for prisoners.⁴³¹ In the Commission's view the rules articulated by the UN "provide reliable benchmarks as to minimal

428 *Tibi*, *supra* note 298, para. 156; *Bulacio*, *supra* note 248, para. 131.

429 *De la Cruz-Flores*, *supra* note 320, para. 132.

430 U.N. Economic and Social Council, First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *United Nations Standard Minimum Rules for the Treatment of Prisoners*, paras. 10-12, 15, 21, 24-25, 31, 40-42, Res. 663 (XXIV) (July 31, 1957), Res. 2076 (LXII) (May 13, 1977).

431 *Denton Aitken v. Jamaica*, Case 12.275, Report No. 58/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (2002), para. 135; *see also*, *Leroy Lamey*, *supra* note 321; *Michael Edwards et al. v. Bahamas*, Cases 12.067, 12.068, 12.086, Report No. 48/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 195. The related articles of the *United Nations Standard Minimum Rules for the Treatment of Prisoners* provide:

10. All accommodation provided for the use of prisoners and in particular all sleeping accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation.

11. In all places where prisoners are required to live or work,

(a) the windows shall be large enough to enable prisoners to read or work by natural light, and shall be so constructed that they can allow the entrance of fresh air whether or not there is artificial ventilation;

(b) Artificial light shall be provided sufficient for the prisoners to read or work without injury to eyesight.

12. The sanitary installations shall be adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent manner...

15. Prisoners shall be required to keep their persons clean, and to this end they shall be provided with water and with such toilet articles as are necessary for health and cleanliness...

21. (1) Every prisoner who is not employed in outdoor work shall have at least one hour of suitable exercise in the open air daily if the weather permits.

(2) Young prisoners, and others of suitable age and physique, shall receive physical and recreational training during the period of exercise. To this end space, installations and equipment should be provided...

24. The medical officer shall see and examine every prisoner as soon as possible after his admission and thereafter as necessary, with a view particularly to the discovery of physical and mental illness and the taking of all necessary measures; the segregation of prisoners suspected of infectious or contagious conditions; the noting of physical or mental defects which might hamper rehabilitation, and the determination of the physical capacity of every prisoner for work.

25. (1) The medical officer shall have the care of the physical and mental health of the

international standards for the humane treatment of prisoners.”⁴³² In consequence, these standards are to be upheld, irrespective of the nature of the offense that is the reason for the imprisonment⁴³³ and regardless of the State’s economic and budgetary problems.⁴³⁴

In light of these standards, the Commission has found, *inter alia*, that solitary confinement on death row, overcrowded cells, confined and unhygienic conditions, insufficient ventilation and natural light, lack of access to exercise, education and religious services, inadequate medical care, abuse by authorities and failure to establish a complaint procedure each violate Article 5 of the American Convention.⁴³⁵

Articles 5(4), (5) and (6) of the American Convention provide for additional State obligations regarding the treatment of persons deprived of liberty.⁴³⁶ Article 5(4) mandates the separation of accused persons and convicted persons

Suite 431...

prisoners and should see daily all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed.

(2) The medical officer shall report to the director whenever he considers that a prisoner’s physical or mental health has been or will be injuriously affected by continued imprisonment or by any condition of imprisonment...

31. Corporal punishment, punishment by placing in a dark cell, and all cruel, inhuman or degrading punishments shall be completely prohibited as punishments for disciplinary offenses...

40. Every institution shall have a library for the use of all categories of prisoners, adequately stocked with both recreational and instructional books, and prisoners shall be encouraged to make full use of it.

41. (1) If the institution contains a sufficient number of prisoners of the same religion, a qualified representative of that religion shall be appointed or approved. If the number of prisoners justifies it and conditions permit, the arrangement should be on a full-time basis.

(2) A qualified representative appointed or approved under paragraph (1) shall be allowed to hold regular services and to pay pastoral visits in private to prisoners of his religion at proper times.

(3) Access to a qualified representative of any religion shall not be refused to any prisoner. On the other hand, if any prisoner should object to a visit of any religious representative, his attitude shall be fully respected.

42. So far as practicable, every prisoner shall be allowed to satisfy the needs of his religious life by attending the services provided in the institution and having in his possession the books of religious observance and instruction of his denomination.

432 *Joseph Thomas*, Case 12.183, Report No. 127/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser.L/V/II.114 Doc. 5 rev. (2001), para. 133.

433 *Id.*, para. 132.

434 *Id.*; *Donnason Knights*, *supra* note 320, para. 126; *see also*, *Damion Thomas v. Jamaica*, Case 12.069, Report No. 50/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 37; *Leroy Lamey*, *supra* note 321, para. 203.

435 *Donnason Knights*, *supra* note 320, paras. 125-126.

436 American Convention, *supra* note 16, arts. 5(4)-(6).

and requires that they receive treatment according to their status.⁴³⁷ Article 5(5) demands that minors be held separately from adults and that they be treated in accordance with their status as minors.⁴³⁸ Article 5(6) states that “punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.”⁴³⁹

In *Tibi*, the Court found that the detention facility where the victim was detained did not separate accused and convicted persons, and this exposed Mr. Tibi to violent living conditions.⁴⁴⁰ On this basis, the Court found a violation of Article 5(4) of the American Convention.⁴⁴¹

In *Children’s Rehabilitation*, the Court determined that many of the minor victims were transferred, for punishment or due to scarce resources, to adult prisons. These minors shared physical space with adult prisoners, and were thereby exposed to violence and sexual abuse.⁴⁴² The Court ruled that this situation violated Article 5(5).⁴⁴³ Similarly, the Commission in *Minors in Detention* stated that the cohabitation of juvenile and adult inmates violated the minors’ human dignity and led to abuses of their personal integrity.⁴⁴⁴

Finally, the Court in *Berenson-Mejía* found that the conditions of detention endured by the victim amounted to cruel, inhuman and degrading treatment, and it also found that the State failed to ensure that the essential aim of the victim’s punishment was her “reform and social readaptation.”⁴⁴⁵ Therefore, the Court concluded that the State party violated Article 5(6) of the American Convention.⁴⁴⁶

3.3.7 Incommunicado Detention

Detainees held incommunicado are prevented from communicating with the outside world, including their lawyers, family members and consular

437 *Id.*, art. 5(4).

438 *Id.*, art. 5(5).

439 *Id.*, art. 5(6).

440 *Tibi*, *supra* note 298, para. 158.

441 *Id.*

442 *Children’s Rehabilitation*, *supra* note 313, para. 175.

443 *Id.*

444 *Minors in Detention*, *supra* note 322, paras. 125-130.

445 *Lori Berenson-Mejía*, *supra* note 291, para. 101.

446 *Id.*

officials.⁴⁴⁷ Incommunicado detention in the case law of the Inter-American System generally refers to situations in which arrested persons are not brought before a judge or other official authorized by law to review the legality of their detention.⁴⁴⁸ Persons held incommunicado are prevented from seeking judicial review of the reasons for their detention. The Court has stated that incommunicado detention is permissible only as an exceptional measure to ensure the results of an investigation and, consequently, it should be strictly applied.⁴⁴⁹ Article 7 of the Convention provides that any person deprived of his or her liberty shall be brought promptly before a judge or other officer authorized by law to exercise judicial power.⁴⁵⁰ Though “promptly” is not defined in the Convention, both the Court and the Commission have referred, when available, to domestic legislation, specifically to constitutional provisions that limit incommunicado detention, as guiding standards in construing the meaning of that term.⁴⁵¹ In *Street Children*, for example, the Court ruled that failure to bring the victims before a judge within 6 hours of their arrest, as required by the Guatemalan Constitution, constituted a violation of Article 7 of the Convention.⁴⁵²

The case law of the Inter-American Court and Commission states that, under certain circumstances, incommunicado detention constitutes a form of cruel, inhuman and degrading treatment in violation of Article 5(2) of the American Convention.⁴⁵³ In *Suárez Rosero* the Court held that:

One of the reasons that incommunicado detention is considered to be an exceptional instrument is the grave effects it has on the detained person. Indeed, isolation from the outside world produces moral and psychological suffering in any person, places him in a particularly

447 *Suárez Rosero*, *supra* note 203, paras. 51, 91; *see also*, *Bulacio*, *supra* note 248, para. 130. It is worth noting that State failure to inform the consular authorities of a detainee’s country of nationality constitutes a breach of Article 36 of the Vienna Convention on Consular Relations. 596 U.N.T.S. 262, April 1963. This is an independent violation of an international treaty – albeit not one specifically intended to protect human rights – which may or may not coincide with a situation of incommunicado detention.

448 *Suárez Rosero*, *supra* note 203, para. 51; *Maritza Urrutia*, *supra* note 252, para. 73.

449 *Suárez Rosero*, *supra* note 203, para. 89; *Bulacio*, *supra* note 248, para. 127; *Castillo-Petruzzi*, *supra* note 295, para. 195.

450 American Convention, *supra* note 16, art. 7(5).

451 *Street Children*, *supra* note 27, para. 133; *Dayra María Levoyer Jiménez v. Ecuador*, Case No. 11.992, Report No. 66/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser./L/V/II.114 Doc. 5 rev. (2001), para. 39.

452 *Street Children*, *supra* note 27, paras. 133-134, 136.

453 *See De la Cruz-Flores*, *supra* note 320, para. 130; *Cantoral-Benavides*, *supra* note 171, para. 89; *Suárez Rosero*, *supra* note 203, para. 91; *Loayza-Tamayo*, *supra* note 112, para. 58; *Ruth Rosario Garcés Valladares v. Ecuador*, Case 11.778, Report No. 64/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), paras. 45-47.

vulnerable position, and increases the risk of aggression and arbitrary acts in prisons.⁴⁵⁴

The Court ruled that holding *Suárez Rosero* incommunicado for thirty-six days was arbitrary and in violation of Ecuador's domestic laws, which prohibited incommunicado detention for more than 24 hours.⁴⁵⁵ The Court therefore deemed the victim's incommunicado detention cruel, inhuman and degrading treatment pursuant to Article 5(2) of the Convention.⁴⁵⁶ In *Castillo-Petruzzi*, the Court found that holding the victims in this case incommunicado for thirty-six and thirty-seven days constituted *per se* cruel, inhuman or degrading treatment or punishment in violation of that provision.⁴⁵⁷ The Court ruled similarly in subsequent cases against Peru in which victims were held incommunicado for periods ranging from eight days⁴⁵⁸ to one month.⁴⁵⁹

The Inter-American Commission applied the Court's approach in *Garcés Valladares*, in which it declared that the mere fact that a person is deprived of any communication with the outside world for a long period of time allows it to conclude that she or he was subjected to cruel and inhuman treatment, especially when the detention is proven to be in violation of domestic law.⁴⁶⁰ The Commission also found an Article 5(2) violation in *Levoyer Jiménez*, in which the victim was held incommunicado for thirty-nine days.⁴⁶¹

3.3.8 Solitary Confinement

The case law of the Court and the Commission has been imprecise as to the definition of "solitary confinement." As will be analyzed later in this section, the case law appears to suggest that this term encompasses at least two distinct situations: 1) prolonged isolation resulting from illegal detention, as in cases of forced disappearance or kidnapping followed by extrajudicial execution; and 2) isolation of a person who is subject to a criminal investigation or serving time after conviction.

454 *Suárez Rosero*, *supra* note 203, para. 90.

455 *Id.*, paras. 91-92.

456 *Id.*

457 *Castillo Petruzzi*, *supra* note 295, para. 192.

458 *Cantoral-Benavides*, *supra* note 171, para. 81.

459 *De la Cruz-Flores*, *supra* note 320, para. 130.

460 *Ruth Rosario Garcés Valladares*, *supra* note 455, para. 45.

461 *Dayra María Levoyer Jiménez*, *supra* note 451, paras. 82-85.

Neither the Court nor the Commission has defined the scope of “prolonged isolation.” However, regarding the first situation, the Court in *Velásquez-Rodríguez* ruled that “prolonged isolation” constitutes cruel, inhuman or degrading treatment.⁴⁶² The Court has applied this ruling in subsequent forced disappearance cases.⁴⁶³ The Commission has also ruled that prolonged isolation in the context of forced disappearances infringes upon the right not to be subjected to cruel, inhuman or degrading treatment.⁴⁶⁴ As to the second situation, the Court concluded in several cases involving antiterrorist legislation in Peru that holding victims in isolation for an extended period of time,⁴⁶⁵ with only one hour of recreation time per day, was a form of cruel, inhuman and degrading treatment in violation of Article 5(2) of the American Convention.⁴⁶⁶

On the other hand, the Commission’s case law regarding prolonged solitary confinement has been contradictory. In *Lizardo Cabrera*, the Commission found that the isolation of the victim constituted torture as defined by Article 2 of the Inter-American Torture Convention.⁴⁶⁷ First, “[t]he solitary confinement was deliberately imposed on Mr. Lizardo.”⁴⁶⁸ Second, the measure was imposed under circumstances in which the victim’s health was weakened as a result of a hunger strike, and therefore inflicted physical and mental pain.⁴⁶⁹ Third, the solitary confinement was imposed as personal punishment for Mr. Lizardo’s participation in a riot at the facility where he was detained.⁴⁷⁰ Finally, the acts complained of were perpetrated by State agents.⁴⁷¹ Though the Commission referred to the Court’s case law characterizing solitary confinement as cruel, inhuman and degrading treatment, the Commission concluded that, given the specific circumstances of this case, the isolation imposed upon Mr. Lizardo constituted torture.⁴⁷² More recently, however, the

462 *Velásquez-Rodríguez*, *supra* note 187, para. 187.

463 *Godínez-Cruz*, *supra* note 187, para.197; *Bámaca-Velásquez*, *supra* note 171, para. 150.

464 *See, e.g., Extrajudicial Executions and forced disappearances v. Peru*, Case 10.247 *et al.*, Report No. 101/01, Inter-Am. C.H.R., Annual Report 2001, OEA/Ser.L/V/II.114 Doc. 5 rev. (2001), para. 228; *Solares Castillo*, *supra* note 367, para. 35.

465 The Peruvian antiterrorist legislation provided for a year of solitary confinement for those convicted of terrorism. *See generally, García-Asto and Ramírez-Rojas v. Peru*, Judgment of November 25, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 137, para. 97.54.

466 *See id.*, para. 229; *Lori Berenson-Mejía*, *supra* note 291, paras. 103-109; *Castillo-Petruzzi*, *supra* note 295, paras. 194-199.

467 *Luis Lizardo Cabrera*, *supra* note 303, para. 86.

468 *Id.*

469 *Id.*

470 *Id.*

471 *Id.*

472 *Id.*, para. 87.

Commission in *Congo* found that solitary confinement constituted cruel, inhuman and degrading treatment.⁴⁷³ In this case, the victim was held in isolation for forty days until he died. The Commission stated that isolation may itself constitute inhumane treatment, and the effects may be aggravated when the victim suffers from a mental disability, as did Mr. Congo.⁴⁷⁴

3.3.9 Unlawful Detention

The Court has consistently held that a person unlawfully detained “is in a situation of heightened vulnerability in which there is a high risk of his or her rights being violated, such as the right to physical integrity and to be treated with dignity.”⁴⁷⁵ In such cases, the Court has determined that the victims were deprived of their liberty by State agents in violation of the procedural and substantive rules contained in Article 7(2)⁴⁷⁶ of the American Convention.⁴⁷⁷ In these cases, the victims were subjected to incommunicado detention as well.⁴⁷⁸

In addition, in *Sánchez*, the Court found that while it did not have sufficient evidence to establish precisely the days or hours of the victim’s detention, “due to the illegality of the detention, a brief period of detention is enough for it to constitute an infringement of his mental and moral integrity according to the standards of international human rights law.”⁴⁷⁹ The Court further ruled that the mere fact of unlawful detention allows the Court “to infer, even if there is no additional evidence in this regard, that treatment of the victim during his isolation was inhuman, degrading, and extremely aggressive.”⁴⁸⁰ The Court reiterated this holding in *Urrutia*⁴⁸¹ and *Gómez-Paquiyaui*.⁴⁸²

473 *Víctor Rosario Congo*, *supra* note 315, para. 59

474 *Id.*, para. 58.

475 *Cantoral-Benavides*, *supra* note 171, para. 90 and cases cited therein; *see also*, *Bámaca-Velásquez*, *supra* note 171, para. 150.

476 Article 7(2) provides that “[n]o one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.” American Convention, *supra* note 16, art. 7(2).

477 *Bámaca-Velásquez*, *supra* note 171, para. 143; *Cantoral-Benavides*, *supra* note 171, paras. 73-77; *Street Children*, *supra* note 27, para. 132.

478 *Bámaca-Velásquez*, *supra* note 171, para. 143; *Cantoral-Benavides*, *supra* note 171, para. 81; *Street Children*, *supra* note 27, para. 164.

479 *Juan Humberto Sánchez*, *supra* note 249, para. 98.

480 *Id.*

481 *Maritza Urrutia*, *supra* note 252, para. 87.

482 *Gómez-Paquiyaui*, *supra* note 252, para. 108.

The Commission reviewed the issue of unlawful detention as cruel and inhuman treatment in *Lizardo Cabrera*.⁴⁸³ The petitioner, a national of the Dominican Republic, was accused of perpetrating a bomb attack, arrested by the National Police and confined and tortured for five days.⁴⁸⁴ Despite the judicial decisions ordering his release based on lack of evidence, the National Police failed to do so, claiming that he must remain in prison on the basis of “police regulations.”⁴⁸⁵ The Commission found that the detention of Mr. Cabrera was illegal.⁴⁸⁶

The Commission also concluded that the victim’s continued detention rose to the level of torture, and in finding a violation of Article 5 of the American Convention, it relied on the definition of torture provided in Article 2 of the Inter-American Torture Convention.⁴⁸⁷ First, “the imprisonment [was] imposed as a deliberate act.”⁴⁸⁸ Second, “the measure affecting Mr. Lizardo constitute[d] a severe attack on his mental and moral integrity. The severity [of the treatment] derive[d] from the constant uncertainty over Mr. Lizardo’s future, which ha[d] lasted six years.”⁴⁸⁹ Third, the purpose of the detention was to inflict pain on the victim.⁴⁹⁰ Finally, the ill-treatment was committed by State agents.⁴⁹¹

3.3.10 Excessive Use of Force

In *Loayza Tamayo*, the Court stated that “[a]ny use of force that is not strictly necessary to ensure proper behavior on the part of the detainee constitutes an assault on the dignity of the person... in violation of Article 5 of the American Convention.”⁴⁹² The Court reiterated this standard in *Castillo-Petruzzi* and *Cantoral-Benavides*, among other cases.⁴⁹³ In *Neira Alegría* and *Durand and Ugarte*, however, the Court rejected the argument that excessive force employed to suppress a prison riot, in which the victims lost their lives,

483 *Luis Lizardo Cabrera*, *supra* note 303, para. 1.

484 *Id.*, para. 2.

485 *Id.*, para. 8.

486 *Id.*, para. 63.

487 *Id.*

488 *Id.*, para. 85.

489 *Id.*

490 *Id.*, para. 81.

491 *Id.*, para. 85.

492 *Loayza-Tamayo*, *supra* note 112, para. 57.

493 *Cantoral-Benavides*, *supra* note 171, para. 96; *Castillo-Petruzzi*, *supra* note 295, para. 197.

constituted a violation of Article 5 of the American Convention.⁴⁹⁴ The Court concluded that, although death resulting from excessive force may trigger a violation of the right to personal integrity, the purpose and scope of Article 5 does not apply to deaths resulting from disproportionate force.⁴⁹⁵

The Commission has ruled that under certain circumstances the State has the right and the responsibility to use force to enforce the law or maintain public order, even if it may result in death or bodily injury.⁴⁹⁶ However, when force is excessive, it may infringe upon the right not to be subjected to cruel, inhuman or degrading treatment. The use of force can be characterized as excessive if it is not “necessary and proportionate to the needs of the situation and the objective to be achieved.”⁴⁹⁷ In consequence, “[t]he legitimate use of force implies, among other factors, that it be both necessary and proportional to the situation, in other words, that it be exercised with moderation and in proportion to the legitimate objective pursued, and in an effort to reduce to a minimum any personal injury and loss of human lives.”⁴⁹⁸

In *Finca “La Exacta,”* for example, more than 200 agents of the Guatemalan National Police armed with teargas and firearms and supported by helicopters, invaded property occupied by a number of farmworkers and their families protesting working conditions.⁴⁹⁹ The Government argued that the use of force was necessary to execute arrest warrants.⁵⁰⁰ As a result of this action, three persons died and eleven were severely injured.⁵⁰¹ The Commission found that the use of force in this case was not necessary to achieve the Government’s stated purpose.⁵⁰² The police had negotiated with the protesters for only a few hours before resorting to violence.⁵⁰³ They failed to wait until it became clear that the persons they sought would not surrender or cooperate.⁵⁰⁴ In addition, the means employed in the attack demonstrated that the force exerted was not proportionate to the objective of arresting a few of the occupants.⁵⁰⁵ In fact,

494 See *Durand and Ugarte*, *supra* note 322, paras. 78-79; *Neira Alegría*, *supra* note 420, para. 86.

495 *Id.*

496 *Finca “La Exacta” v. Guatemala*, Case 11.382, Report No. 57/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev. 1 (2002), para. 39.

497 *Id.*, para. 40.

498 *Corumbiara Massacre v. Brazil*, Case 11.556, Report No. 32/04, Inter-Am. C.H.R., Annual Report 2004, OEA/Ser.L/V/II.122 Doc. 5 rev. 1 (2004), para. 174.

499 *Finca “La Exacta,” supra* note 496, para. 35.

500 *Id.*, para. 37.

501 *Id.*, para. 68.

502 *Id.*, para. 55.

503 *Id.*, para. 54.

504 *Id.*

505 *Id.*, para. 55.

law enforcement personnel used a tractor, air support and heavy weapons to surround the occupants, then opened fire on them.⁵⁰⁶ The police tactics make clear that the attack was aimed at the forcible eviction of the occupants and not the arrest of the persons named in the warrants.⁵⁰⁷ Furthermore, the use of force involved in the police plan of attack lacked appropriate safeguards against the unrestrained use of force.⁵⁰⁸ Based on the foregoing, the Commission deemed the State action an excessive use of force, which violated the injured persons' rights to physical, mental and moral integrity under Article 5 of the American Convention.⁵⁰⁹

The Commission applied a similar analysis in *Corumbiara*, in which approximately 500 farm workers invaded a ranch and were evicted by military police, assisted by landowners and hired gunmen.⁵¹⁰ In this case, the Commission concluded that the use of excessive force, which injured and killed a number of civilians, violated their right to humane treatment.⁵¹¹ The situation was aggravated by the State's failure to investigate the resulting death and injuries.⁵¹²

The Commission also found that the release of teargas into an overcrowded cell with an obstructed ventilation system in an attempt to repress a riot violated the right to humane treatment.⁵¹³ In the context of the Colombian armed conflict, the Commission found a violation of the right to humane treatment in a case involving members of illegal armed groups who were arbitrarily executed after being captured or placed *hors de combat*.⁵¹⁴ The Commission based its decision on the following rule:

[W]hen some combatants have ceased participating in the hostilities and no longer pose a threat or the possibility of immediate harm to the adversary, they do not qualify as legitimate military targets. Mistreatment, and even more so extrajudicial executions, of wounded or captured combatants are grave violations of Common Article 3 [of the Geneva Conventions].⁵¹⁵

506 *Id.*

507 *Id.*

508 *Id.*, para. 65.

509 *See id.*, para. 68.

510 *See generally, Corumbiara Massacre, supra* note 498.

511 *Id.*, para. 226.

512 *See id.*, para. 208.

513 *Parque São Lucas v. Brazil*, Case 10.301, Report No. 40/03, Inter-Am. C.H.R., Annual Report 2003, OEA/Ser.L/V/II.118 Doc. 5 rev. 2 (2003), para. 52.

514 *Arturo Ribón Avila v. Colombia*, Case 11.142, Report No. 26/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), paras. 136, 140.

515 *Id.*, para. 140; *see also*, Geneva Convention Relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, art. 3.

In *Ul Musicue et al.*, the Commission found that forcing the victims to accompany members of the armed forces into combat, thereby exposing them to danger constituted cruel treatment in violation of Article 5 of the Convention.⁵¹⁶

3.3.11 Death Penalty

In *Hilaire*, the Court stated that even though the American Convention does not prohibit the death penalty in itself, its related provisions “should be interpreted as ‘imposing restrictions designed to delimit strictly its application and scope, in order to reduce the application of the death penalty to bring about its gradual disappearance.’”⁵¹⁷

The Commission, for its part, has found that there is a general consensus in international human rights case law that death penalty provisions in human rights treaties must be interpreted restrictively.⁵¹⁸ A restrictive interpretation is necessary “to ensure that the law strictly controls and limits the circumstances in which a person may be deprived of his life by authorities of the State.”⁵¹⁹ This interpretation also mandates strict compliance with due process standards.⁵²⁰ Furthermore, the Commission has noted that international and domestic institutions acknowledge that the death penalty is a form of punishment that differs in both substance and degree from other means of punishment.⁵²¹ The Commission itself described the death penalty as “the absolute form of punishment that results in the forfeiture of the most valuable of rights, the right to life and, once implemented, is irrevocable and irreparable.”⁵²² Therefore, Article 4 of the American Convention, which authorizes the death penalty in exceptional circumstances, must be interpreted as extremely limiting. Petitioners’ claims will be subject to “an enhanced level of scrutiny in order to ensure that any deprivation of life effected by a State Party pursuant

516 *Ceferino Ul Musicue et al. v. Colombia*, Case 9.853, Report No. 4/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc.6 rev. (1997), para. 36.

517 *Hilaire*, *supra* note 185, para. 99 (citing *Restrictions to the Death Penalty (Arts. 4.2 and 4.4 American Convention on Human Rights)*, Advisory Opinion OC-3/83, September 8, 1983, Inter-Am. Ct. H.R. (Ser. A) No. 3, para. 57).

518 *Dave Sewell v. Jamaica*, Case 12.347, Report No. 76/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/III17 Doc. 1 rev. 1 (2002), para. 88; *Denton Aitken*, *supra* note 431, para. 100; *Paul Lallion v. Grenada*, Case 11.765, Report No. 55/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/III17 Doc. 1 rev. 1 (2002), para. 60.

519 *Dave Sewell*, *supra* note 518, para. 88.

520 *Id.*; *Paul Lallion*, *supra* note 518, para. 54; *see also Denton Aitken*, *supra* note 431, para. 100.

521 *See Dave Sewell*, *supra* note 518, para. 89; *Denton Aitken*, *supra* note 431, para. 101; *Paul Lallion*, *supra* note 518, para 61.

522 *See Dave Sewell*, *supra* note 518, para. 89; *Denton Aitken*, *supra* note 431, para. 101; *Paul Lallion*, *supra* note 518, para 61.

to a death sentence complies strictly with the provisions of the Convention, including in particular Articles 4, 5 and 8 of the Convention.”⁵²³

In the Inter-American System two death penalty-related situations have been found to violate the right to humane treatment: detention on death row and mandatory death sentences. Though petitioners have advanced such arguments in several cases, the Commission has not ruled on the question whether a particular method of execution, such as hanging, constitutes cruel, inhuman or degrading treatment or punishment.⁵²⁴

The Court in *Hilaire* cited the European Court’s determination that the “death row phenomenon” is a form of cruel, inhuman and degrading treatment and is characterized by a prolonged period of detention while awaiting execution.⁵²⁵ In *Hilaire*, the Court found that the prisoners lived with the constant threat of being hanged, on the basis of laws that were incompatible with the American Convention.⁵²⁶ The period preceding their executions terrified the victims, caused them to be depressed, deprived them of sleep and caused them other ill effects.⁵²⁷ The Court therefore ruled that the conditions of the prisoners’ death row detention constituted cruel, inhuman and degrading treatment in violation of Article 5.⁵²⁸

Similarly, the Commission has concluded that prolonged solitary confinement combined with poor conditions while on death row failed to meet the minimum standards required by Articles 5(1) and (2).⁵²⁹ In *Andrews*, the Commission found that the eighteen years spent by the victim on death row, among other factors, amounted to a violation of his right not to be subjected to cruel, infamous or unusual punishment pursuant to Article XXVI of the American Declaration.⁵³⁰

523 *Dave Sewell*, *supra* note 518, para. 78; *Denton Aitken*, *supra* note 431, para. 90; *Benedict Jacob v. Grenada*, Case 12.158, Report No. 56/02, Inter-Am. C.H.R., Annual Report 2002, OEA/Ser.L/V/II.117 Doc. 1 rev.1 (2002), para. 59; *Leroy Lamey*, *supra* note 321, para. 103.

524 *Dave Sewell*, *supra* note 518, para. 118; *Benedict Jacob*, *supra* note 523, para. 98; *Joseph Thomas*, *supra* note 432, para. 136.

525 *See Hilaire*, *supra* note 185, para. 167 (citing *Soering v. United Kingdom*, Eur. Ct. H.R., No. 14038/88, July 7, 1989). The European Court in *Soering* held that prisoners sentenced to death suffer severe mental anxiety due to a variety of circumstances, including: the way in which the sentence was imposed, lack of consideration of the personal characteristics of the accused, the disproportionality between the punishment and the crime committed, detention conditions while awaiting execution and other factors.

526 *Id.*, paras. 168-169.

527 *Id.*, para. 168.

528 *Id.*, paras. 168-169.

529 *Leroy Lamey*, *supra* note 321, para. 203; *Donnason Knights*, *supra* note 320, para. 126.

530 *William Andrews v. United States*, Case 11.139, Report No. 57/96, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 178.

With regard to mandatory death sentences for all murder convictions, the Commission has consistently ruled that this practice contravenes Article 5(1) because it fails to respect the victim's physical, mental and moral integrity.⁵³¹ In *Denton Aitken*, the Commission found that depriving the victim of his most fundamental right, the right to life, without taking into account his personal circumstances and the particular circumstances of the offense, failed to respect his integrity as an individual human being and subjected him to treatment of an inhuman or degrading nature.⁵³²

In *Donnason Knights*, the Commission explained its application of Article 5 to the death penalty, particularly 5(1) and 5(2), in the following terms:

Among the fundamental principles upon which the American Convention is grounded is the recognition that the rights and freedoms protected thereunder are derived from the attributes of their human personality. From this principle flows the basic requirement underlying the Convention as a whole, and Article 5 in particular, that individuals be treated with dignity and respect. Accordingly, Article 5(1) guarantees to each person the right to have his or her physical, mental, and moral integrity respected, and Article 5(2) requires all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person. These guarantees presuppose that persons protected under the Convention will be regarded and treated as individual human beings, particularly in circumstances in which a State Party proposes to limit or restrict the most basic rights and freedoms of an individual, such as the right to liberty. In the Commission's view, consideration of respect for the inherent dignity and value of individuals is especially crucial in determining whether a person should be deprived of his or her life.⁵³³

The Commission reiterated in this case that it could not reconcile respect for the dignity of the individual as protected by Article 5(1) and (2) with a mandatory death sentence, because such a system deprives the individual of the most fundamental right without considering whether execution is the appropriate punishment in the individual's particular case.⁵³⁴

531 *Denton Aitken*, *supra* note 431, para. 111; *Donnason Knights*, *supra* note 320; para. 82.

532 *Denton Aitken*, *supra* note 431, para 111.

533 *Donnason Knights*, *supra* note 320, para. 81.

534 *Id.*, para. 82.

3.4 Other Prohibitions Under Inter-American Human Rights Law Related to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Inter-American human rights law enunciates two additional prohibitions necessary for effective protection from torture and other cruel, inhuman or degrading treatment, namely: the principle of *non-refoulement* in the context of extradition or expulsion, and the exclusionary rule with respect to evidence obtained through torture. Below, we will explore the scope of these prohibitions in Inter-American law and jurisprudence.

3.4.1 Non-refoulement

Article 22(8) of the American Convention enshrines the right not to be deported or returned to a country where a person is in danger of being subjected to a violation of the right to life or personal freedom because of her or his race, nationality, religion, social status or political opinion.⁵³⁵ Furthermore, Article 13 of the Inter-American Torture Convention requires that a person not be extradited or returned to a country “when there are grounds to believe that his life is in danger, that he will be subjected to torture or to cruel, inhuman or degrading treatment, or that he will be tried by special or *ad hoc* courts in the requesting State.”⁵³⁶

The Inter-American Court has not decided any case addressing the principle of *non-refoulement*. The Commission, on the other hand, addressed this issue in the *Haitian Interdiction* case in 1997.⁵³⁷ Since the defendant State, the United States, had not ratified the Convention,⁵³⁸ the Commission applied only the American Declaration, in particular Article I, which protects the right to security.⁵³⁹ This right was defined by the Commission as “a person’s legal and

535 American Convention, *supra* note 16, art. 22(8).

536 Inter-American Torture Convention, *supra* note 23, art. 13. It is important to note that the American Convention provision only applies where the violation feared would occur because of certain enumerated grounds; however, the Inter-American Torture Convention imposes no such conditions. The Inter-American Torture Convention may therefore apply to a broader class of situations.

537 *The Haitian Centre for Human Rights et al. v. United States*, Case 10.657, Report No. 51/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996).

538 The United States is not a party to the American Convention or the Inter-American Torture Convention.

539 *Haitian Centre for Human Rights*, *supra* note 537, para. 150.

uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.”⁵⁴⁰

In this case, the Commission found that Haitian asylum seekers were interdicted by the U.S and returned to Haiti pursuant to a cooperative agreement between the U.S. Government and the regime established in Haiti in 1981. Because these refugees were exposed to acts of brutality by the Haitian military and its supporters upon their return, the Commission found that their interdiction and repatriation to Haiti constituted a breach of their right to security in violation of the American Declaration.⁵⁴¹ The Commission also concluded that the United States had violated their right to liberty and their right to seek and receive asylum under the American Declaration.⁵⁴²

3.4.2 Exclusionary Rule

Article 8(3) of the American Convention forbids the use of confessions in legal proceedings if it is established that the statement was obtained through coercion of any kind.⁵⁴³ Article 10 of the Inter-American Torture Convention prohibits the use of any statement obtained through torture as evidence in a legal proceeding.⁵⁴⁴ The only circumstance in which such a statement may be used as evidence is in the prosecution of the person accused of eliciting the information through torture.⁵⁴⁵ Though the Inter-American Torture Convention appears to bar evidence obtained through torture only, the American Convention, through the use of the word “coercion,” leaves room for broader application, and may encompass confessions extracted under treatment that could be characterized as cruel, inhuman and degrading. Unfortunately, the relevant case law of both the Court and the Commission is quite nascent on this point and therefore does not clarify the scope of these provisions.

In one of the few related Inter-American cases, the Court in *Cantoral-Benavides* found that the victim was tortured to “break down his psychological resistance and force him to incriminate himself or confess to certain illegal activities.”⁵⁴⁶ Thus the Court declared a violation of Article 8(3) of the

540 *Id.*, para. 170.

541 *Id.*, para. 171.

542 *Id.*, paras. 169, 163.

543 American Convention, *supra* note 16, art 8(3).

544 Inter-American Torture Convention, *supra* note 23, art. 10.

545 *Id.*

546 *Cantoral-Benavides*, *supra* note 171, para. 132.

Convention.⁵⁴⁷ The Commission found that Article 10 of the Inter-American Torture Convention was violated in *Manríquez*, in which the victim had been convicted on the basis of evidence obtained exclusively through torture.⁵⁴⁸

3.5 General Duties to Respect and Ensure

The general duties to respect and ensure enshrined in Article 1(1) of the American Convention are guiding principles regarding the attribution of State responsibility under the American Convention.⁵⁴⁹ They are also considered substantial obligations under the Convention and are violated whenever an infringement of a right protected by that treaty takes place.⁵⁵⁰ In other words, States assume these general obligations in relation to each of the rights protected by the American Convention.⁵⁵¹

The general duty to respect rights and freedoms entails a negative obligation not to violate the rights recognized in the Convention. Thus, “[w]henver a State organ, official or public entity violates one of those rights, this constitutes a failure of the duty to respect...”⁵⁵² The general duty to ensure involves a positive obligation to organize governmental structures, adopt appropriate measures and take action to guarantee the free and full exercise of rights.⁵⁵³ The duty to ensure is three-fold and obliges States “to prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation.”⁵⁵⁴ While the duty to respect is an obligation of result,⁵⁵⁵ the duty to ensure is one of means.⁵⁵⁶ Thus, the duty to ensure is not violated *per se* in each occasion the

547 *Id.*, para. 133.

548 *Manuel Manríquez v. Mexico*, Case 11.509, Report No. 2/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), para. 85.

549 See Section 3.6, *infra*.

550 *Velásquez-Rodríguez*, *supra* note 187, para. 162.

551 *Id.*

552 *Id.*, para. 169.

553 *Id.*, para. 166.

554 *Godínez-Cruz*, *supra* note 187, para. 175; see also, *Velásquez-Rodríguez*, *supra* note 187, para. 166.

555 An “obligation of result” requires States to achieve specific objectives to satisfy a substantive provision.

556 An “obligation of means” or “of conduct” requires States to take action reasonably calculated to realize a certain outcome.

measures taken by the State do not produce a satisfactory result; it must be proven that the State failed to act with due diligence either to prevent or redress the alleged violation.⁵⁵⁷

With respect to the prohibition of torture and other cruel, inhuman and degrading treatment or punishment, the duties to prevent, to investigate and punish and to make reparations emerge not only from the American Convention, but also from specific obligations under the Inter-American Torture Convention.⁵⁵⁸ In the following sections, we will analyze the scope of these obligations in light of both conventions.

3.5.1 Duty to Prevent

The Court in *Velásquez-Rodríguez* explained the duty to prevent as follows:

The duty to prevent includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party. Of course, while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventive measures.⁵⁵⁹

The duty to prevent, therefore, is breached whenever it is established that the respondent State failed to act with due diligence to prevent an infringement of Convention rights. In the context of torture and other cruel, inhuman and degrading treatment, the Court in *Velásquez-Rodríguez* concluded that although it was not possible to prove that the victim was subjected to torture, “his kidnapping and imprisonment by governmental authorities, who have been shown to subject detainees to indignities, cruelty and torture, constitute a failure of Honduras to fulfill the duty imposed by Article 1(1) to ensure the rights under Article 5(1) and 5(2) of the Convention.”⁵⁶⁰ Thus, the Court found that the State had violated the right not to be tortured as a result of the State’s failure to exercise due diligence to prevent the human rights violations of

557 See *Godínez-Cruz*, *supra* note 187, para. 188.

558 In particular, Articles 1, 6, 7, 8, 10, 12. Inter-American Torture Convention, *supra* note 23.

559 *Velásquez-Rodríguez*, *supra* note 187, para. 175.

560 *Id.*, para. 187.

Mr. Velásquez Rodríguez.⁵⁶¹ The Court has recently found that the duty to prevent an Article 5 violation with regard to persons deprived of their liberty entails a positive obligation to ensure detention conditions that respect minimum basic standards of human dignity.⁵⁶² Applying this obligation, the Court held Paraguay responsible for a violation of Article 5 as read together with Article 1(1) of the American Convention, because the Government failed to ensure compliance with minimum basic standards in a juvenile detention center.⁵⁶³

Similarly, the Commission has held that the existence of a practice of incomunicado detention by State authorities followed by torture or death, to which an individual victim can be linked, permits a finding of an Article 5 violation, based on the State's failure to create conditions that ensure every individual's right not to be tortured.⁵⁶⁴ In another case, the Commission identified violations of the right not to be subjected to torture or cruel, inhuman or degrading treatment based on the State failure to adopt positive measures ensuring minimum basic prison condition standards and implement a system to address emergency situations in correctional facilities.⁵⁶⁵

The Inter-American Torture Convention includes several provisions regarding the obligation of States parties to take measures to prevent torture.⁵⁶⁶ In particular, Article 1 articulates a general obligation to prevent torture.⁵⁶⁷ Article 6 mandates that States parties criminalize acts of torture and attempts to commit torture under their national criminal laws and punish torture with severe penalties that reflect the serious nature of the crime.⁵⁶⁸ Likewise, States must implement effective measures to prevent and punish other cruel, inhuman or degrading treatment or punishment within their respective jurisdictions.⁵⁶⁹ Article 7 obligates States to train police and other public officials responsible for the custody of detainees regarding the prohibition of torture and other cruel, inhuman and degrading treatment.⁵⁷⁰

561 *Id.*

562 *Children's Rehabilitation*, *supra* note 313, para. 159.

563 *Id.*, paras. 170-171.

564 *See, e.g., Víctor Hernández Vásquez v. El Salvador*, Case 10.228, Report No. 65/99, Inter-Am. C.H.R., Annual Report 1998, OEA/Ser.L/V/II.102 Doc. 6 rev. (1998), paras. 55-56.

565 *Carandiru v. Brazil*, Case 11.291, Report No. 34/00, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 91.

566 *See* Inter-American Torture Convention, *supra* note 23, arts. 1, 6-7.

567 *Id.*, art. 1.

568 *Id.*, art. 6.

569 *Id.*

570 *Id.*, art. 7.

On these bases, the Court has found violations of Articles 1 and 6 of the Inter-American Torture Convention whenever a State party has failed to exercise due diligence in preventing torture or other mistreatment in its jurisdiction.⁵⁷¹ The same approach has been followed by the Commission.⁵⁷²

3.5.2 Duty to Investigate and Punish

As stated previously, the Court has found that the duty to ensure imposed by Article 1(1) of the American Convention encompasses a State obligation to investigate and punish any violation of rights recognized by the Convention.⁵⁷³ The Court in *Velásquez-Rodríguez* concluded that a State party is under a legal duty “to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”⁵⁷⁴ Furthermore, the Court provided that

If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.⁵⁷⁵

The Commission has declared that the duty to investigate and punish “requires punishment not only of material authors, but also of the intellectual authors of those acts.”⁵⁷⁶

As with the duty to prevent, the failure of the State to identify and punish the perpetrator does not constitute a violation of the obligation to investigate, as long as it has exercised due diligence in its investigation.⁵⁷⁷ However, this duty

must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective

571 *See Tibi, supra* note 298, para. 159; *Gómez-Paquiyaauri, supra* note 252, paras.114-117; *Bámaca-Velásquez, supra* note 171, paras. 220-223.

572 *González Pérez, supra* note 231, para. 90.

573 *See* Section 3.5, *supra*.

574 *Velásquez-Rodríguez, supra* note 187, para. 174; *see also, Godínez-Cruz, supra* note 187, para. 184.

575 *Velásquez-Rodríguez, supra* note 187, para. 176.

576 *Corumbiara Massacre, supra* note 498, para 256.

577 *Velásquez-Rodríguez, supra* note 187, para. 177; *Godínez-Cruz, supra* note 187, para. 188.

and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁵⁷⁸

In Inter-American case law, the duty to investigate violations of core rights, such as the right to life and the right to be free from torture or cruel, inhuman or degrading treatment, is related to the Article 8 right to access to justice and due process and the Article 25 right to an effective remedy.⁵⁷⁹ The Court in *Velásquez-Rodríguez* held that

[u]nder the Convention, States Parties have an obligation to provide effective judicial remedies to victims of human rights violations (Art. 25), remedies that must be substantiated in accordance with the rules of due process of law (Art. 8 (1)), all in keeping with the general obligation of such States to guarantee the free and full exercise of the rights recognized by the Convention to all persons subject to their jurisdiction (Art. 1[(1)]).⁵⁸⁰

The victim in *Sánchez* was subjected to brutal torture and ultimately executed, and the Court in this case held that the right to an effective remedy under Articles 8 and 25, read together with Article 1(1) of the American Convention, requires a serious, impartial and effective investigation of the alleged facts.⁵⁸¹ In defining this standard, the Court referred to the United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions.⁵⁸²

Likewise, in *Martín de Mejía*, where the victim was raped, the Commission stated that

the obligation [to investigate] contained in Article 1(1) is a necessary corollary of the right of every individual to recourse to a tribunal to obtain judicial protection when he believes he has been a victim of violation of any of his human rights. If this were not so, the right to obtain

578 *Godínez-Cruz*, *supra* note 187, para. 188.

579 *Street Children*, *supra* note 27, para. 225.

580 *Velásquez-Rodríguez v. Honduras*, Preliminary Objections, Judgment of June 26, 1987, Inter-Am. Ct. H.R., (Ser. C) No. 1, para. 91.

581 *Juan Humberto Sánchez*, *supra* note 249, para. 127.

582 *Id.*

effective recourse set forth in Article 25 would be absolutely without content.⁵⁸³

In *González Pérez*, the Commission relied on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment in assessing whether the investigation carried out to identify the perpetrators of the rape in this case was impartial and therefore in compliance with the Convention.⁵⁸⁴

The Inter-American Torture Convention also imposes specific obligations upon States to investigate fully and punish those responsible for torture and other cruel, inhuman or degrading treatment. Article 1 articulates the general obligation to punish torture.⁵⁸⁵ Article 8 obligates States to ensure an impartial investigation into any person's claim of prohibited conduct under its jurisdiction.⁵⁸⁶ Where there is a well-grounded reason to believe that torture has occurred in its jurisdiction, the State must immediately investigate the allegations and initiate criminal proceedings against the perpetrators, if appropriate.⁵⁸⁷ Finally, this provision ensures that victims who have exhausted domestic remedies can proceed to submit petitions to "the international fora whose competence has been recognized by that State."⁵⁸⁸

Like the duty to prevent, in cases where torture or other cruel, inhuman or degrading treatment has been alleged and the respondent State is a party to the Inter-American Torture Convention, both the Court and the Commission have found violations of Articles 1 and 8, when it was proven that the State failed to conduct an effective investigation.⁵⁸⁹

As mentioned, Article 6 obliges the States parties to criminalize and punish authors of acts of torture with adequate penalties, Article 4 of the Inter-American Torture Convention provides that having acted under the orders of a superior will not preclude a perpetrator's criminal liability.⁵⁹⁰ Article 11 imposes a duty to extradite to a requesting State any person accused or convicted of committing torture.⁵⁹¹ Article 13 states that torture is deemed to be

583 *Raquel Martín de Mejía*, *supra* note 299, p. 190.

584 *González Pérez*, *supra* note 231, para. 78.

585 Inter-American Torture Convention, *supra* note 23, art. 1.

586 *Id.*, art. 8.

587 *Id.*

588 *Id.*

589 *Tibi*, *supra* note 298, para. 159; *Maritza Urrutia*, *supra* note 252, paras. 128-130; *Bámaca-Velásquez*, *supra* note 171, paras. 221-223; *Corumbiara Massacre*, *supra* note 498, para. 287.

590 Inter-American Torture Convention, *supra* note 23, art. 4.

591 *Id.*, art. 11.

included as an extraditable offence in every extradition treaty entered into by a State party to this convention.⁵⁹² Where a State receives a request for the extradition of an alleged torturer from a State with which there is no extradition treaty, the Inter-American Torture Convention may serve as the legal basis for such extradition, provided that other legal requirements of the requested State are respected.⁵⁹³

Article 12 provides that a State shall adopt the necessary measures to exercise jurisdiction over a crime of torture when it is committed within the State's jurisdiction, when the alleged perpetrator is a national of the State or when the victim is a national of the State.⁵⁹⁴ This provision also imposes on States parties the duty to "take the necessary measures to establish its jurisdiction over the crime [of torture] when the alleged criminal is within the area under its jurisdiction;" this wording provides legal bases for establishing universal jurisdiction⁵⁹⁵ over torture perpetrators, when it is inappropriate to extradite that person to another State.⁵⁹⁶ Article 14 enshrines the *aut dedere aut punire* principle, which entails that a State that decides not to extradite an alleged perpetrator will submit the case to its domestic authorities as if the crime had taken place within its jurisdiction.⁵⁹⁷ Neither the Court nor the Commission has ever applied Article 4, 11, 12 or 13 in the context of an individual case.

3.5.3 Duty to Provide Reparation

Article 63(1) of the American Convention establishes that if the Court finds a violation of the rights protected by this treaty, the Court must provide, where appropriate, for adequate reparation to the victim.⁵⁹⁸ The Court in its Article 1(1) case law has ruled that the duty to ensure entails an obligation to make

592 *Id.*, art. 13.

593 *Id.*

594 *Id.*, art. 12.

595 Universal jurisdiction refers to the power to prosecute and try the alleged author of an offence, irrespective of the place where it was committed and irrespective of the suspect's and the victim's nationality or country of residence.

596 Inter-American Torture Convention, *supra* note 23, art. 12.

597 *Id.*, art. 14. *Aut dedere aut punire* (literally, "either extradite or punish") refers to the obligation to exercise one of two alternative powers: either to extradite an alleged offender to the requesting State, if such a request has been extended, or to try and sentence the offender in the captor State's own domestic courts. The *aut dedere aut punire* obligation complements the universal jurisdiction principle. Together they prevent a situation in which a State that is unwilling or unable to extradite an individual also may not prosecute him or her because of citizenship or because the offense occurred on another State's territory.

598 American Convention, *supra* note 16, art. 63(1).

adequate reparations.⁵⁹⁹ As regards torture, Article 9 of the Inter-American Torture Convention obliges States to incorporate into their domestic laws the duty to provide suitable compensation for torture victims.⁶⁰⁰ This provision, however, appears not to include an obligation to make reparations for other cruel, inhuman or degrading treatment or punishment.

The Court has consistently stated that it is a principle of international law, and “even a general concept of law,” that every violation of an international obligation that results in damage triggers a duty to make adequate reparation.⁶⁰¹ Each aspect of this obligation (scope, nature and determination of beneficiaries) is regulated by international law and therefore cannot be modified by a State’s domestic legislation.⁶⁰² The Court stated in its initial jurisprudence that compensation was the most common form of redress for human rights violations,⁶⁰³ but in recent years, the Court has expanded the non-pecuniary measures awarded to victims of human rights violations.⁶⁰⁴

The Court has determined that reparation for violations of international obligations must take the form, if possible, of full restitution (*restitutio in integrum*), which consists in the restoration of the situation prior to the violation, the reparation of the consequences of the violation and monetary compensation for material and nonmaterial damages, including emotional harm.⁶⁰⁵ Where full restitution is not possible “it is for the international court to determine a set of measures, in addition to ensuring the rights abridged, to address the consequences of the infractions, as well as ordering payment of a compensation for the damage caused.”⁶⁰⁶ The guiding principle is that reparation must

599 *Godínez-Cruz*, *supra* note 187, para. 175; *Velásquez-Rodríguez*, *supra* note 187, para. 166.

600 Inter-American Torture Convention, *supra* note 23, art. 9.

601 *Velásquez-Rodríguez v. Honduras*, Compensatory Damages (Art. 63(1) American Convention on Human Rights), Judgment of July 21, 1989, Inter-Am. Ct. H.R., (Ser. C) No. 7, para. 25; *see also*, *Moiwana Village*, *supra* note 398, para. 169; *Cesti-Hurtado v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 78, para. 32.

602 *Aloeboetoe et al. v. Suriname*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of September 10, 1993, Inter-Am. Ct. H.R., (Ser. C) No. 15, para. 44; *Trujillo Oroza v. Bolivia*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of February 27, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 92, para. 61.

603 *Velásquez-Rodríguez*, *supra* note 582, para. 25.

604 *See, e.g.*, *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 125, paras. 210-227; *Plan de Sánchez Massacre v. Guatemala*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 19, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 116, paras. 93-111; *see also*, *López Alvarez v. Honduras*, Judgment of February 1, 2006, Inter-Am. Ct. H.R. (Ser. C) No. 141, paras. 207-210.

605 *Raxcacó-Reyes*, *supra* note 211, para. 115; *Plan de Sánchez*, *supra* note 604, para. 53.

606 *Myrna Mack-Chang*, *supra* note 390, para. 236; *see also*, *Plan de Sánchez Massacre*, *supra* note 604, para. 59; *Gómez-Paquiayauri*, *supra* note 252, para. 189.

seek to remove the effects of the violation(s).⁶⁰⁷ The nature and amount of compensation depend on the damage inflicted and therefore are directly related to the specific violations found by the Court.⁶⁰⁸

According to the practice of the Court, adequate reparation includes pecuniary and non-pecuniary damages as well as legal costs and expenses. Pecuniary damages include the victim's loss of or reduction in income (lost earnings) as well as expenses incurred by the victim or his or her family as a result of the human rights violation(s) (consequential damages).⁶⁰⁹ In recent decisions, the Court has included in its pecuniary damages orders the loss of family assets resulting from the human rights violation(s).⁶¹⁰

Generally, the amount of pecuniary damages awarded is based on the victim's particular profession or economic situation.⁶¹¹ The Court has decided cases in which the victims had no established profession because they were deprived of their liberty,⁶¹² or were children.⁶¹³ The Court has also awarded material damages to internally displaced victims who lacked documentation of their assets or earnings.⁶¹⁴ In all such cases, the Court assessed pecuniary damages on the basis of equity⁶¹⁵ and, in some circumstances, on the basis of the minimum wage in the country.⁶¹⁶

On the other hand, non-pecuniary damages include:

both the sufferings and affliction caused to the direct victims and their next of kin – the impairment of highly significant personal values – and also the changes of a non-pecuniary nature in the lives of the victim or

607 *19 Merchants, supra* note 381, para. 223; *Mapiripán Massacre, supra* note 211, para. 245; *Pueblo Bello v. Colombia*, Judgment February 31, 2006, Inter-Am. Ct. H.R., (Ser. C) No. 140, para. 229.

608 *19 Merchants, supra* note 381, para. 223; *Mapiripán Massacre, supra* note 211, para. 245; *Pueblo Bello, supra* note 610, para. 229.

609 *Mapiripán Massacre, supra* note 211, para. 250.

610 *See, e.g., Bulacio, supra* note 248, para. 88; *Gutiérrez-Soler v. Colombia*, Judgment of September 12, 2005, Inter-Am. Ct. H.R., (Ser. C) No. 132, paras. 77-78.

611 *See Loayza-Tamayo v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of November 27, 1998, Inter-Am. Ct. H.R., (Ser. C) No. 42, para. 129.

612 *See, e.g., Neira-Alegría et al. v. Peru*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of September 19, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 29.

613 *See, e.g., "Street Children" v. Guatemala (Villagrán-Morales et al.)*, Reparations (Art. 63(1) American Convention on Human Rights), Judgment of May 26, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 77.

614 *Moiwana Village, supra* note 398, para. 187; *Pueblo Bello, supra* note 607, paras. 247-248.

615 *Neira-Alegría, supra* note 420, paras. 49-50; *Pueblo Bello, supra* note 610, para. 248; *see also, Moiwana Village, supra* note 398, para. 187; *Plan de Sánchez Massacre, supra* note 604, para. 74; *Mapiripán Massacre, supra* note 211, para. 274.

616 *See, e.g., Street Children, supra* note 613, para. 79.

his family. As it is not possible to assign a precise monetary equivalent to non-pecuniary damage, there are only two ways in which it can be compensated, in order to make integral reparation to the victims. First, by the payment of an amount of money or the delivery of goods or services of a significant financial value, which the Court determines by the reasonable application of legal discretion and fairness; and, second, by the execution of acts or civil works of a public nature or with public impact that have effects such as the recovery of the victims' memory, acknowledgement of their dignity, consolation of their next of kin, or dissemination of a message of official disapproval of the respective human rights violations and of commitment to efforts to ensure that they do not happen again.⁶¹⁷

In general, with regard to material or pecuniary damages, the Court awards monetary payment.⁶¹⁸ In some cases, however, the Court has found that the decision recognizing the violation of the victim's rights constitutes sufficient reparation.⁶¹⁹

With regard to non-pecuniary damages, the Court has developed an innovative approach to the scope of measures of redress ordered to States. For example, the Court in recent cases has ordered States to adopt stricter measures to protect persons deprived of their physical liberty from being subjected to mistreatment. In *Sánchez*, the Court ordered Honduras to create a national record of detainees in order to monitor the legality of arrests carried out by State agents and also to prevent violations of the right not to be tortured or subjected to other forms of cruel, inhuman or degrading treatment.⁶²⁰ The registry must include the name of the person arrested, the reasons for his or her detention, the authority ordering the detention, the date and time of the detention and release, as well as information regarding the applicable warrant.⁶²¹

A similar approach was followed by the Court in *Bulacio*,⁶²² and in this case the Court reiterated the importance of respecting basic due process rights, such as notification of the detainee as to the reasons for the arrest, immediate judicial review and notification of a family member, lawyer or consular official, in the prevention of torture or other cruel, inhuman or degrading treatment.⁶²³

617 *Trujillo-Oroza v. Bolivia*, *supra* note 602, para. 77.

618 *Myrna Mack-Chang*, *supra* note 390, para. 267; *Trujillo-Oroza*, *supra* note 602, para. 79.

619 *Cantos v. Argentina*, Judgment of November 28, 2002, Inter-Am. Ct. H.R., (Ser. C) No. 97, para. 71.

620 *Juan Humberto Sánchez*, *supra* note 249, para. 189.

621 *Id.*

622 *Bulacio*, *supra* note 248, para. 132.

623 *Id.*, paras. 128-130.

For that reason, the Court ordered the State to amend its domestic legislation to ensure respect for these rights in the future.⁶²⁴ Furthermore, in *Gutiérrez Soler*, the Court ordered the State to implement a program to train doctors, judges and prosecutors on the United Nations Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (“Istanbul Protocol”) in order to prevent future acts of torture.⁶²⁵ The Court also ordered the State to strengthen the existing monitoring mechanisms in its national detention centers.⁶²⁶ The State must perform a medical examination of the detainee immediately upon detention, periodically assess the mental health of the detention center’s personnel and authorize regular access to detention centers for representatives of official human rights institutions.⁶²⁷

In cases in which the Court found a violation of the right not to be tortured or subjected to cruel, inhuman or degrading treatment, the Court has, as a form of reparation, ordered the State to carry out an effective investigation to identify the perpetrators and where warranted, to punish them according to domestic law.⁶²⁸ Victims and their families must have full access to and participation in criminal proceedings, and investigation results must be publicly available.⁶²⁹ In *Tibi*, the Court ordered the State to publish the relevant parts of its decision in the State official publication (*Diario Oficial*), in another national Ecuadorian newspaper and in a widely circulated French newspaper.⁶³⁰ In addition, the State was ordered to acknowledge its international responsibility for the events that transpired in the case through a written declaration published in Ecuadorian and French newspapers.⁶³¹

With respect to legal costs and expenses, the Court has held that

it is for the Court to prudently assess [the] scope [of reimbursement], including expenses incurred before the authorities under domestic jurisdiction and those incurred in the course of the proceeding before the inter-American [sic] system, bearing in mind the circumstances of the specific case and the nature of international jurisdiction for the protection of human rights. This assessment can be based on the principle

624 *Id.*, para. 144.

625 *Gutiérrez Soler*, *supra* note 610, para. 110.

626 *Id.*, para. 111.

627 *Id.*, para. 112.

628 *Tibi*, *supra* note 298, para. 258; *Maritza Urrutia*, *supra* note 252, para. 177; *Juan Humberto Sánchez*, *supra* note 249, para. 186.

629 *Juan Humberto Sánchez*, *supra* note 249, para. 186.

630 *Tibi*, *supra* note 298, para. 260.

631 *Id.*, para. 261.

of fairness and take into account the expenses stated by the parties, insofar as their *quantum* is reasonable.⁶³²

The Commission, based on its findings of violations to the American Convention, recommends to the responsible State that it make appropriate reparations to redress these violations. However, the Commission does not specify in its public reports the scope or nature of those reparations.⁶³³

3.6 Establishing State Responsibility

3.6.1 General

In monitoring State compliance with the American Convention and other Inter-American instruments, the Court and the Commission have jurisdiction over States, but not over individuals. They do not determine individual culpability for human rights violations and do not impose punishments on individuals.⁶³⁴ The function of the Commission and the Court is to protect victims, determine whether their rights have been violated and order appropriate redress for the harm caused by such violations.⁶³⁵

The Inter-American Commission, however, may monitor the conduct of non-State actors under its power to examine the general situation of human rights in a particular State. Usually, the Commission includes its findings regarding non-State actors in its general reports on individual countries. For example, in its Third Report on Colombia, the Commission recognized that many actors contribute to the situation of violence in that country and the State is not internationally responsible for all of the harm caused to its citizens by non-State agents.⁶³⁶ In addition, the Commission devoted a section of the report to

632 *Myrna Mack-Chang*, *supra* note 390, para. 290.

633 *See, e.g., Corumbiara Massacre*, *supra* note 498, para. 307; *Dayra María Levoyer Jiménez*, *supra* note 451, para. 123.

634 *Castillo-Petruzzi*, *supra* note 295, para. 90; *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention*, *supra* note 162, para. 56.

635 *See Hilaire*, *supra* note 185, para. 66; *Cantoral-Benavides*, *supra* note 171, para. 46; *Castillo-Petruzzi*, *supra* note 295, para. 90; *Panel Blanca*, *supra* note 27, para. 71; *Suárez Rosero*, *supra* note 203, para. 37.

636 Inter-Am. C.H.R., *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102 Doc. 9 rev. 1, February 26, 1999, Chapter 1, paras. 1-6.

violations of international humanitarian law perpetrated by non-State armed groups involved in the Colombian conflict.⁶³⁷

In its first contentious cases, the Court defined the rules governing the attribution of international responsibility to States when the American Convention has been violated. In *Velásquez-Rodríguez*, the Court held that

Article 1(1) is essential in determining whether a violation of the human rights recognized by the Convention can be imputed to a State Party. In effect, that article charges the States Parties with the fundamental duty to respect and guarantee the rights recognized in the Convention. Any impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention.⁶³⁸

The Commission has followed this approach and has cited extensively the Court's case law when deciding imputing international responsibility to States.⁶³⁹

Recently the Court in *Maripipán Massacre* went even further in delineating the rules governing the attribution of international responsibility. In essence, the Court held that although the American Convention refers to general rules of international law regarding State responsibility, Articles 1(1) and 2 are *lex specialis*.⁶⁴⁰ The special nature of the Convention as a human rights treaty, vis-à-vis general rules of international law, requires that attribution of international responsibility, as well as the determination of its scope and effects, be established in light of the provisions of that treaty.⁶⁴¹

Two recent developments in the Court's case law appear to be in line with its later position regarding the specific application of the Convention in attributing State responsibility. First, the Court has found that human rights violations

637 *Id.*, Chapter 4.

638 *Velásquez-Rodríguez*, *supra* note 187, para. 164; *see also*, *Caballero-Delgado*, *supra* note 111, paras. 54-56; *Godínez-Cruz*, *supra* note 187, para. 173.

639 *See, e.g.*, *Coutinho Mendes*, *supra* note 199, para. 102; *Ignacio Ellacuría, S. J. et al. v. El Salvador*, Case 10.488, Report No. 136/99, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 157; *Hugo Bustios Saavedra v. Peru*, Case 10.548, Report No. 38/97, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 83; *Marroquín*, *supra* note 367, para. 37.

640 Literally, "special law." This term refers to a principle of international law according to which the more specific norms, or body of norms, regulating a given issue will prevail over more general rules (*lex generalis*).

641 *Mapiripán Massacre*, *supra* note 211, para 107.

committed against members of a certain group, such as children,⁶⁴² or committed under certain circumstances, as in the context of a pattern of violations, may warrant a finding of aggravated State responsibility.⁶⁴³ In *Plan de Sánchez*, the Court stated that the aggravated nature of the State's pattern of abuses against an indigenous community should be considered in determining appropriate reparations.⁶⁴⁴

The Court's case law has been inconsistent as to the extinguishment of a State's international responsibility for Convention violations. In *Las Palmeras*, the Court ruled that the domestic court decision awarding monetary compensation to the victims' families extinguished the State's international responsibility.⁶⁴⁵ More recently, however, in *Gómez-Paquiyaury* and *Canese*, the Court appears to have dramatically reversed its position by suggesting that, if by the time the petition was submitted to the Inter-American System the State had not redressed the violation, any subsequent action to remedy the situation would not permit the State to avoid international responsibility.⁶⁴⁶ In both cases, despite the fact that domestic courts had adopted measures to redress the human rights violations, the Court continued to review the cases and found the States in violation of the Convention.

In Inter-American case law regarding the attribution of international responsibility for human rights violations, there are two grounds on which a State may be found responsible. First, international responsibility may be directly imputable to a State as a result of acts and omissions perpetrated by State agents or organs (duty to respect); second, a State may be found responsible for acts perpetrated by non-State actors when it fails to exercise due diligence in preventing, investigating and redressing the alleged violation (duty to ensure). These two grounds are explained in more detail in the following sections.

642 *Children's Rehabilitation*, *supra* note 313, para. 251; *Gómez-Paquiyaury*, *supra* note 252, para. 76; *Molina-Theissen v. Guatemala*, Reparations (Art. 63.1 American Convention on Human Rights), Judgment of July 3, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 108, para. 41.

643 *Myrna Mack-Chang*, *supra* note 390, para. 139.

644 *Plan de Sánchez Massacre*, *supra* note 604, paras. 81.

645 *Las Palmeras v. Colombia*, Judgment of December 6, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 90, paras. 32-34.

646 *Gómez-Paquiyaury*, *supra* note 252, para. 75; *Ricardo Canese v. Paraguay*, Judgment of August 31, 2004, Inter-Am. Ct. H.R., (Ser. C) No. 111, para. 71.

3.6.2 Attribution of Unlawful Activity for Acts and Omissions

Inter-American case law reflects general rules of international law regarding the attribution of international responsibility for State acts or omissions. Any act or omission committed by a State organ or agent which violates a person's rights is a breach of the duty to respect under Article I(1), and the responsibility therefore is imputable to the State.⁶⁴⁷ According to the Court, "[t]his conclusion is independent of whether the organ or official has contravened provisions of internal law or overstepped the limits of his authority: under international law a State is responsible for the acts of its agents undertaken in their official capacity and for their omissions, even when those agents act outside the sphere of their authority or violate internal law."⁶⁴⁸ The State agent's motivation in committing the violation is irrelevant for purposes of attributing international responsibility to the State. The Court has consistently held that a State may be found responsible even where the perpetrator of the violation cannot be identified.⁶⁴⁹

International responsibility may result from the acts or omissions of any State organ, whether executive, legislative or judicial.⁶⁵⁰ The Court has held, for example, that a State may breach its American Convention obligations by adopting measures that fail to respect the provisions of the Convention.⁶⁵¹ The fact that measures have been adopted in conformity with a State's domestic law is not relevant to the determination of international responsibility.⁶⁵² A State may also be found responsible for failing to adopt measures to ensure a full exercise of Convention rights, as required by Article 2.⁶⁵³ In "*The Last*

647 *Mayagna (Sumo) Awajitj Community v. Nicaragua*, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79, para. 154; *Velásquez-Rodríguez*, *supra* note 187, para. 169.

648 *Velásquez-Rodríguez*, *supra* note 187, para. 170; *see also*, *Godínez-Cruz*, *supra* note 187, paras. 178-180; *Caballero-Delgado*, *supra* note 111, para. 56; *Neira Alegría*, *supra* note 420, para. 63; "*Five Pensioners*" *v. Peru*, Judgment of February 28, 2003, Inter-Am. Ct. H.R., (Ser. C) No. 98, para. 163.

649 *Panel Blanca*, *supra* note 27, para. 91; *Gangaram-Panday*, *supra* note 242, para. 62; *Godínez-Cruz*, *supra* note 187, para. 183; *Velásquez-Rodríguez*, *supra* note 187, para. 173.

650 "*The Last Temptation of Christ*" *v. Chile (Olmedo-Bustos et al.)*, Judgment of February 5, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 73, para. 72.

651 *Certain Attributes of the Inter-American Commission On Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*, Advisory Opinion OC-13/93, July 16, 1993, Inter-Am. Ct. H.R., (Ser. A) No. 13, para. 26; *Barrios Altos v. Peru*, Judgment of March 14, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 75, para. 42.

652 *Certain Attributes of the Inter-American Commission on Human Rights*, *supra* note 651, para. 26; *Hilaire*, *supra* note 185, para. 152.

653 *Certain Attributes of the Inter-American Commission on Human Rights*, *supra* note 651, para. 26; *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention*, *supra* note 162, para. 37.

Temptation of Christ,” the Court examined a film censorship policy implemented by all three branches of the Chilean Government and provided for in the Chilean Constitution. The Court found Chile internationally responsible for the violation of the right to freedom of expression protected under Article 13 of the American Convention.⁶⁵⁴

The Commission’s case law conforms to the Court’s. In *Canuto de Oliveira*, for example, the Commission ruled that

international law assigns the State international responsibility for the behavior of its institutions and agents when they are operating in that capacity, even if outside the normal scope of their functions. This includes the higher organs of the State, such as the Executive, Legislative, and Judicial Branches, and acts and omissions of public officials or agents acting in their place.⁶⁵⁵

Furthermore, the federal clause contained in Article 28 of the American Convention has not prevented the Court and the Commission to attribute international responsibility to federal States for acts or omissions committed by agents or organs of their political subdivisions.⁶⁵⁶ In *Garrido and Baigorria*, the Court noted that “the case law, which has stood unchanged for more than a century, holds that a State cannot plead its federal structure to avoid complying with an international obligation.”⁶⁵⁷ The Commission in *Canuto de Oliveira* found the State of Brazil responsible for the murder of a union leader, perpetrated at the order of the Mayor of Rio Maria del Sur, a town in the Federal State of Pará.⁶⁵⁸

The Court and the Commission have found States responsible for their support of, tolerance for and acquiescence to human rights violations by private

654 “*The Last Temptation of Christ*,” *supra* note 650, para. 72.

655 *João Canuto De Oliveira v. Brazil*, Case 11.287, Report No. 24/98, Inter-Am. C.H.R., Annual Report 1997, OEA/Ser.L/V/II.98 Doc. 6 rev. (1997), para. 39; *see also, e.g., Tarcisio Medina Charry*, *supra* note 374, paras. 104-105; *Arturo Ribón Avila*, *supra* note 514, para. 149.

656 American Convention, *supra* note 16. Article 28 provides:

“1. When a State Party is a Federal State, the National Government of that State Party shall comply with all the provisions of this Convention related to the subjects over which it exercises legislative and judicial jurisdiction.

2. As regards provisions pertaining to matters that fall within the scope of the entities comprising the federation, the national Government must immediately take the pertinent steps pursuant to its constitution and laws, so that the competent authorities of said entities may adopt the necessary provisions to ensure compliance with this Convention.”

657 *Garrido and Baigorria v. Argentina*, Judgment of February 2, 1996, Inter-Am. Ct. H.R., (Ser. C) No. 26, para. 46.

658 *João Canuto de Oliveira*, *supra* note 655, paras. 41, 43-44.

actors.⁶⁵⁹ Violations perpetrated by private individuals or groups acting as government proxies may also be attributed to the State.⁶⁶⁰ In *Blake*, the Court determined that members of the civil patrol, a private paramilitary group, who murdered the victim were agents of the State, because “at the time the events in this case occurred, the civil patrols enjoyed an institutional relationship with the Army, performed activities in support of the armed forces’ functions, and, moreover, received resources, weapons, training and direct orders from the Guatemalan Army and operated under its supervision.”⁶⁶¹

In two recent cases against Colombia, the Court ruled on the relationship between the paramilitary and State agents. In *19 Merchants*, the Court found that the extrajudicial execution of nineteen victims was carried out by paramilitary members, with the cooperation and support of top commanders of the Colombian Army, with whom the paramilitary group held a close relationship.⁶⁶² The Court therefore ruled that Colombia was responsible for the violations of several rights protected by the Convention.⁶⁶³ Similarly, in *Mapiripán Massacre*, it was established that paramilitary members landed in two commercial planes at an airport controlled by the Armed Forces; they were later transported in military trucks to the place where the massacre occurred.⁶⁶⁴ The paramilitary members wore military attire, carried guns authorized for military use and communicated with radios.⁶⁶⁵ They took control of Mapiripán and tortured and murdered approximately 49 victims.⁶⁶⁶ The Court found Colombia internationally responsible for the arbitrary deprivation of the victims’ lives and for other violations of the American Convention, precisely because the perpetrators acted with the cooperation and active support of the Colombian Army.⁶⁶⁷

The Commission in its Third Report on the Situation of Human Rights in Colombia stated that

in all cases where paramilitaries act as proxies of State agents or with the cooperation or acquiescence of those agents, the State becomes

659 *Panel Blanca*, *supra* note 27, para. 91; *Velásquez-Rodríguez*, *supra* note 187, para. 173; *María Mejía v. Guatemala*, Case 10.553, Report No. 32/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc 7 rev. (1996), para. 57.

660 *See, e.g., Third Report on the Human Rights Situation in Colombia*, *supra* note 636, Chapter IV, para. 234.

661 *Blake*, *supra* note 242, para. 76.

662 *19 Merchants*, *supra* note 381, para. 138.

663 *Id.*, para. 295.

664 *Mapiripán Massacre*, *supra* note 211, paras. 96.30-96.32.

665 *Id.*, paras. 96.34.

666 *Id.*, paras. 96.39.

667 *Id.*, para. 123.

internationally responsible for the abuses which they commit. The international responsibility of the State for the human rights abuses committed is not diminished by the fact that the State has enunciated a general policy against the paramilitaries.⁶⁶⁸

The Commission applied this rule in *Riofrío Massacre*, in which the cooperation of paramilitary forces with State agents in the perpetration of human rights violations was clearly established.⁶⁶⁹

3.6.3 Attribution of Unlawful Activity for Lack of Due Diligence

Inter-American case law comports with a well-established principle of international law according to which the acts and omissions of private individuals are not directly attributable to States.⁶⁷⁰ In *Velásquez-Rodríguez*, however, the Court stated:

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.⁶⁷¹

The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure, found in Article 1(1) of the American Convention. The Court's case law reflects this principle by repeatedly holding States internationally responsible based on their lack of due diligence to prevent human rights violations, to investigate

668 *Third Report on the Human Rights Situation in Colombia*, *supra* note 636, Chapter IV, para. 249.

669 *Riofrío Massacre v. Colombia*, Case 11.654, Report No. 62/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), para. 51.

670 International Law Commission (ILC), Draft Articles on State Responsibility for Internationally Wrongful Acts with commentaries, Report of the ILC to the UN General Assembly, adopted at its 53rd Session, *Official Records of the General Assembly, Fifty-sixth session, Suppl. No 10 (A/56/10)*, available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf, Chapter II, pp. 83-84, paras. 2-3.

671 *Velásquez-Rodríguez*, *supra* note 187, para. 172; *see also*, *Godínez-Cruz*, *supra* note 187, paras. 181-182; *Caballero-Delgado*, *supra* note 111, para. 56.

and sanction the perpetrators or to provide appropriate reparations to the victims or their families.⁶⁷²

The Commission adopts the Court's approach to the attribution of State responsibility for the acts and omissions of private individuals. In *Maria Da Penha*, for example, the Commission found that the State's failure to exercise due diligence to prevent and investigate a domestic violence complaint warranted a finding of State responsibility under the American Convention and the Belém do Pará Convention.⁶⁷³ Similarly, in *Ortiz v. Guatemala*, the Commission found a pattern of repression in Guatemala against members of the Church who worked with the poor and indigenous, and the human rights violations perpetrated against Sister Ortiz were found to be linked to that practice. The existence of the practice evidenced the State's failure to prevent human rights violations and investigate and punish those who committed them.⁶⁷⁴ In *Víctor Manuel Oropeza*, the Commission did not find the State responsible for failure to prevent the violation of the victim's right to life, because the threats against Mr. Oropeza were never reported to the competent authorities.⁶⁷⁵ The Commission did, however, find the State responsible for the lack of an appropriate investigation into the victim's assassination.⁶⁷⁶

In the past, establishing State responsibility for the failure to prevent, investigate and provide reparations did not benefit from Court or Commission guidance regarding the scope of "due diligence." In the recent *Pueblo Bello Massacre* decision, however, the Court made clear that the duty to ensure does not imply the State's unlimited responsibility for any private action.⁶⁷⁷ Instead, the State's duty to prevent and protect against private acts or omissions is limited to situations in which the State is aware of the existence of an actual and immediate risk to an individual or group and where the State has a reasonable opportunity to prevent or avoid that risk.⁶⁷⁸

672 *Juan Humberto Sánchez*, *supra* note 249, paras. 109-113; *Bámaca-Velásquez*, *supra* note 171, paras. 132-135; for a different approach, *see Las Palmeras*, *supra* note 645, para. 42 (where the Court, after establishing that the act could not be linked to a State agent, held that Colombia had carried out a proper investigation into the alleged murder of one of the victims and that, therefore, it had discharged its duty to ensure the victim's right to life).

673 *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), paras. 43-44; 55-57.

674 *Dianna Ortíz v. Guatemala*, Case 10.526, Report No. 31/96, Inter-Am. C.H.R., Annual Report 1996, OEA/Ser.L/V/II.95 Doc. 7 rev. (1996), paras. 80-84, 127.

675 *Víctor Manuel Oropeza v. Mexico*, Case 11.740, Report No. 130/99, Inter-Am. C.H.R., Annual Report 1999, OEA/Ser.L/V/II.106 Doc. 6 rev. (1999), para. 26.

676 *Id.*, para. 44.

677 *Pueblo Bello*, *supra* note 607, para. 123.

678 *Id.*